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IN THE

Supreme Court of the United States

October Term, 1987

FREDRIC HABERMAN, *et al.*,
Appellants,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,
Appellees.

On Appeal From the Supreme Court of Washington

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Where a bond indenture stipulates the laws of the state of the municipal issuer shall constitute a contract with those who purchase the bonds from time to time, do these laws enter into and become part of the bond contract that is afforded constitutional protection against impairment?

If so, were the contract rights of investors who purchased bonds of the Washington Public Power Supply System unconstitutionally impaired under U.S. Const., Art. I, § 10, cl. 1, when the Washington State legislature enacted an amendment retroactively altering express strict civil liability provisions of the Washington State Securities Act to require proof that prospectus fraud was intentionally committed by the "sellers" in order to obtain rescission?

PARTIES BELOW

The persons who constitute appellant-plaintiffs Fredric Haberman, *et al.* are listed on an attachment entitled "Schedule of All Parties to Proceedings Below" appended in lieu of a footnote to this jurisdictional statement. Appellee-defendants Washington Public Power Supply System, *et al.* are also listed on the attached schedule.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FREDRIC HABERMAN, *et al.*,

Appellants,

vs.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *ET AL.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

JURISDICTIONAL STATEMENT

Appellants Fredric Haberman, *et al.* ("plaintiffs") seek review of a final judgment rendered by the Supreme Court of Washington which, in the face of a Contracts Clause challenge (U.S. Const., Art. 1, § 10, cl. 1), held S. 3990, a retroactive amendment to the Washington State Securities Act ("WSSA"), to be constitutional.

Plaintiffs sued to rescind bond contracts representing investments in Washington Public Power Supply System ("WPPSS") Nuclear Projects 4 and 5 bonds ("WPPSS 4/5 bonds"). S. 3990, generally known as the "Scienter Amend-

ment," retroactively altered express WSSA civil liability provisions which held issuers of municipal securities strictly liable for any untrue statements or material omissions in a prospectus. As amended, WSSA now requires investors to prove a Washington State municipality or its agents intentionally commited "prospectus fraud," *Randall v. Loftsgaarden*, 478 U.S. ____, 92 L.Ed.2d 525, 539 (1986), in order to rescind a bond contract.

In accordance with Rule 28.4(c) of this Court, because 28 U.S.C. § 2403(b) may be applicable, plaintiffs have served their revised notice of appeal and this jurisdictional statement upon the Attorney General of the State of Washington. Plaintiffs understand that no "court of the United States" as defined in 28 U.S.C. § 451 has certified to the State of Washington Attorney General the fact that the constitutionality of the Scienter Amendment has been drawn in question.

OPINIONS BELOW[1]

The October 8, 1987 opinion of the court below is reported at 109 Wash.2d 107 and 744 P.2d 1032. Timely motions asking the Washington Supreme Court to reconsider rulings favorable to plaintiffs and intervenors American Express Travel Related Services Company, *et al.* ("Amexco/US") were filed by some of the appellee-defendants ("defendants"). On Feburary 17, 1988, the court below made three minor changes to the text of its opinion, App. at 85, and on February 19, 1988 otherwise denied defendants' motions for reconsideration. App. at 86.

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[1]The Washington Supreme Court rendered its decision on S. 3990. The trial court did not consider S. 3990 because the legislature enacted it after this case had been appealed to the Washington Supreme Court. The trial court found a predecessor to S. 3990, identified by the legislature as S. 4114, to be retroactive and upheld its constitutionality.

STATEMENT OF JURISDICTIONAL GROUNDS

Plaintiffs appeal from a judgment rendered by the court below on October 5, 1987 (modified by order dated February 17, 1988; reconsideration denied on February 19, 1988) rejecting a Contracts Clause challenge to the constitutionality of S. 3990 [published at Laws of 1986, Ch. 304 § 1 amending RCW 21.20.430(7)]. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

Plaintiffs filed their original notice of appeal solely on Contracts Clause grounds with the Supreme Court of Washington on March 25, 1988 (App. at 87). An amended notice of appeal was filed on May 11, 1988 (App. at 230).[2]

Although remanded to the trial court for further proceedings, this case is ripe for review. A federal constitutional issue has been finally decided by the highest court in the state of Washington which "will survive and require decision regardless of the outcome of future state proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975).

The judgment of the Washington Supreme Court allowing a state legislature without good cause to alter retroactively contract remedies seriously erodes an important federal constitutional protection of investors' property rights. Where important federal policies are contravened by state court judgments, this Court has not hesitated to grant immediate review even where, as here, it is conceivable the appellant may ultimately prevail at trial on non-federal grounds. *See Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984); *Hudson Distributors*

[2]Plaintiff hereby joins Amexco/US in a separate jurisdictional statement challenging the Scienter Amendment on several other constitutional grounds.

v. Eli Lilly, 377 U.S. 386 (1964); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

The WPPSS 4/5 bond $2.25 billion debacle has spawned a cottage industry of related litigation. These cases are presently clogging federal and state court dockets. Reversal of the lower court's judgment upholding the constitutionality of the Scienter Amendment will likely result in summary disposition of this case and many of these related cases.[3]

Pending federal and state cases involving WPPSS 4/5 bonds include the class action entitled *In re WPPSS Securities Litigation*, Case No. MDL—551 (W.D. Wash.),[4] a suit brought by the bond trustee for the WPPSS 4/5 bonds entitled *Chemical Bank v. Benton County PUD No. 1, et al.*, Cause No. C83-1080 (W.D. Wash.), and a group of actions pending in fourteen federal district courts instituted by purchasers of WPPSS 4/5 bonds against individual brokers and broker-dealders. *See, e.g., Kronfeld v. Advest, Inc., et al.*, 85 Civ. 4673 (S.D.N.Y.); *Kronfeld v. First Jersey National Bank*, Civil Action No. 85-2929 (D.N.J.); and *McCarthy v. Miller Schroeder Municipals, Inc.*, Civil Action No. 85-3951 (N.D.Cal.).

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[3]Summary disposition would be appropriate because certain material facts involving WPPSS 4/5 bonds, Statement of the Case, *infra*, are not susceptible of dispute. *See Celotex Corp. v. Catrett*, 477 U.S. ____, 91 L.Ed.2d 268, 274 (1986) ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses").

[4]The federal district court in MDL-551, although citing no specific authority in support of its decisions, twice has held the Scienter Amendment unconstitutional under separation of powers concepts. MDL-551 orders dated April 30, 1987 and November 16, 1987. Because of the possibility of being reversed on appeal, the class action plaintiffs in MDL-551 must try their federal and state securities claims as if they both require proof of scienter.

WPPSS related litigation also includes various cases where insurance companies seek to disclaim coverage of the defendants named in this suit and MDL-551. *See, e.g., Transcontinental Insurance Co. v. Washington Public Utility District Systems,* Case No. 2005-4-1 (Wash. Ct. App.); *Grange v. Emerick,* Case No. 84-2-12489-0 (Wash. St. King Cty. Sup. Ct.); and *Ebasco v. General Accident,* Civil Action No. 3-88-1517-T (W.D.Tex.).

Immediate review of the judgment of the court below will lead to reversal of erroneous precedent contrary to established constitutional principles. This Court's decision will impact on all WPPSS 4/5 bond related litigation and likely avoid "a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Mills v. Alabama,* 384 U.S. 214, 217-218 (1966).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Art. 1, § 10, cl. 1 provides that:

> No State shall . . . pass any Law impairing the Obligation of Contracts . . .

S. 3990 [codified as RCW 21.20.430(7)[5]] provides:

> Notwithstanding subsections (1) through (6) of this section, if an initial offer or sale of securities that are exempt from registration under RCW 21.20.310 is made by this state or its agencies, political subdivisions, municipal or quasi-municipal corporations, or other instrumentality of one or more of the forego-

[5]The pertinent text of each applicable WSSA civil liability provision other than RWC 21.20.430(7) is included in plaintiffs' appendix. App. at 105-106, 247.

ing and is in violation of RCW 21.20.010(2), and any such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such issuer acting on its behalf, or person in control of such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such person acting on its behalf, materially aids in the offer or sale, such person is liable to the purchaser of the security only if the purchaser establishes scienter on the part of the defendant. The word "employee" or the word "agent," as such words are used in this subsection, do not include a bond counsel or an underwriter. Under no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters. The provisions of this subsection are retroactive and apply to any action commenced but not final before July 27,1985. In addition, the provisions of this subsection apply to any action commenced on or after July 27, 1985.

STATEMENT OF THE CASE

WPPSS is a Washington State municipal corporation established and authorized by state law to construct, own and operpate electrical generating facilities including Nuclear Projects 4 and 5 ("the Projects"). Its constituent members are four Washington cities and 19 Washington public utility districts ("PUDS"). App. at 8. In 1976, 20 of these members, eight other Washington municipalities and one irrigation district, 11 Oregon cities and utility districts, five Idaho cities and 43 rural electrical cooperatives in Washington, Idaho, Montana, Nevada, Oregon and Wyoming ("the Participants") entered into Participants' Agreements to guarantee payment of debt service on WPPSS 4/5 bonds. App. at 8-9.

WPPSS, together with its investment adviser, Blyth Eastman, Paine Webber, Inc., its engineers, accountants and attorneys, thereafter prepared Official Statements and Annual Reports for use in the offer and sale of WPPSS 4/5 bonds. These prospectuses stated that the Projects were feasible and represented that the municipal issuer — based on the guarantees promised by the Participants — had the financial ability to pay debt obligations for the Projects' construction and initial operation. App. at 10.

The WPPSS 4/5 bonds were sold beginning in 1977 pursuant to WPPSS Resolution 890. This bond indenture, in language echoed in Official Statements and Annual Reports subsequently issued, states that after an analysis of engineering, economic and environmental studies, the WPPSS Board had found that construction of the Projects was "economically feasible and required" and that the power and energy "produced by the Projects can be disposed at prices sufficient, with all other available revenues, to retire the Bonds." App. at 128. The bond indenture also identifies the Participants' Agreement as the primary security for payment of debt service on WPPSS 4/5 bonds. App. at 137.

Section 14.1 of Resolution 890, captioned "Resolution and Laws a Contract with Bondholders," states in relevant part:

> In consideration of the purchase and acceptance of the Bonds by those who shall hold the same from time to time, the provisions of the Resolution [and the laws of the State of Washington] shall constitute a contract with the holder or holders of each bond and coupon pertaining thereto, and the obligations of [WPPSS] and the Board under said laws and under the Resolution shall be enforceable by any court of competent jurisdiction. . . .

App. at 129. An amendment to the bond indenture confirmed that Washington state laws existing at the time the bonds were purchased were incorporated into the bond contract. App. at 130-131.

Defendants first represented that the Projects would cost $3.4 billion and would begin operation in 1982 (Project No. 4) and 1984 (Project No. 5). On May 29, 1981, WPPSS announced that, because it was unable to sell WPPSS 4/5 bonds in 1982, construction on the Projects would be temporarily terminated. On the same date, WPPSS withdrew its 15th bond offering of what the court below described as a 15 part series, announcing cost estimates totalling $7 billion in its March 17, 1981 Official Statement "had been understated by approximately $5 billion." App. at 11.[6] On January 22, 1982, the WPPSS Board formally terminated the Projects.

In 1982 Chemical Bank sought a declaratory judgment to enforce the Participants' Agreements. The Washington Supreme Court determined that the agreements of Washington State municipal and PUD Participants to guarantee payment of debt service on WPPSS 4/5 bonds were void *ab initio*. *Chemical Bank v. WPPSS*, 99 Wash.2d 772, 799, 666 P.2d 329 (1983). On November 6, 1984, the Washington Supreme

[6]The admission of a $5 billion understatement of completion costs for the Projects in the March 17, 1981 Official Statement as well as other evidence that the Projects were never feasible entitle investors in WPPSS 4/5 bonds to rescind their bond contracts if the Scienter Amendment is held unconstitutional. Excerpts from the March 17, 1981 Official Statement for the 14th offering of WPPSS 4/5 bonds are included in plaintiffs' appendix at 136-226. The failure of WPPSS and its retained professionals to disclose fully material facts concerning the cost and feasibility of the projects renders false warranties in WPPSS 4/5 bond certificates that "*all acts . . . required by* the Constitution and *statutes of the State of Washington . . .* and to *have been performed* precedent to and *in the issuance of this Bond . . . and have been performed* in due time, form and manner *as prescribed by law.*" App. at 133 (Emphasis added).

Court reconsidered and reaffirmed its previous opinion and further held all other Participants were released from obligations under the Participants' Agrements on the basis of commercial frustration and mutual mistake. *Chemical Bank v. WPPSS*, 102 Wash.2d 874, 888-889, 691 P.2d 524 (1984), *cert. denied*, 471 U.S. 1065 (1985).

Plaintiffs filed suit on May 7, 1984. The primary cause of action asserted by plaintiffs and joined in by Amexco/US was that defendants had violated WSSA by misrepresentations made in selling documents distributed to the marketplace for municipal securities. WPPSS 4/5 bonds purchased by the investors in this case aggregate approximaely $400 million, or nearly twenty percent of the $2.25 billion face amount sold by the municipal issuer. App. at 49.

After extensive oral argument before the trial court, all WSSA causes of action were dismissed. App. at 13. As part of its ruling, the trial court upheld the constitutionality of S. 4114, the predecessor version of the Scienter Amendment. Plaintiffs and Amexco/US appealed and the Washington Supreme Court granted direct review. *Id.*

Prior to enactment of the Scienter Amendment, a municipal issuer that violated RCW 21.20.430(1) — even by an innocent material misrepresentation — was strictly liable for rescission of its bond contracts. The Washington State Department of Licensing, the state agency charged with enforcing WSSA, acknowledged this fact in a memorandum dated March 7, 1985 commenting on the proposed enactment of S. 4114:

> The issue with regard to the [Scienter Amendment] is very important with regard to the pending law suits against WPPSS. The bondholders have brought . . . securities fraud claims . . . under the express provisions of RCW 21.20.430 . . . Under the

> [WSSA], scienter need not be proved in these claims. . .
>
> The character of the suit is such that [the Scienter Amendment] could change the ability of the plaintiffs to make any recovery against either certain parties in the litigation or possibly any of them at all.

App. at 102-103.

The Department of Licensing further acknowledged that bond ratings of municipal debt issues could be affected by passage of the Scienter Amendment: "The bond ratings are based on many criteria relating to the risks to bondholders. Changing the elements of proof under (WSSA) for suing bond holders may result in change in bond ratings." *Id.*

Subsequent to initial passage of the Scienter Amendment, District Judge Browning held in MDL-551 that S. 4114 could not be retroactively applied in the absence of an express legislative intent indicating the amendment was retroactive. MDL-551 Order dated January 24, 1986. Within two months of this ruling, the Washington State Legislature enacted S. 3990, containing a specific provision making the Scienter Amendment retroactive to "any action commenced but not final before July 27, 1985." App. at 107.

Washington State legislators were subjected to strong political pressure to pass this legislation by municipal officials of the 23 WPPSS members and Washington State Participants, entities who pursuant to RCW 21.20.430(3) could bear secondary responsibility to satisfy judgments rendered against WPPSS under RCW 21.20.430(1). App. at 27. While ostensibly proposed to shield municipal officials, one Senator candidly explained that passage of the Scienter Amendment would in fact confiscate funds of investors such as plaintiffs:

> There was one thing in this scheme that [the municipal officials] overlooked and that was maintaining the responsibility. Now they're down here and they want us to do this retroactively . . . because of the ratepayers in the state of Washington. In other words, we are wanting to help confiscate this money because it may raise electrical rates in the state. . .

Remarks by Senator Garrett. App. at 121.

Not all Washington State legislators were willing to succumb to the strong passions aroused by the specter of Washington municipalities meeting their contractual obligations to investors in WPPSS 4/5 bonds. As stated by one Senator: "(W)e should be trying to stay with the contract that originally had been set up and with the original facts that these bondholders had certain rights that also should be protected in terms of contract rights." Remarks of Senator Zimmerman. App. at 118.

Yet another Senator expressed a constitutional distaste for passage of the Scienter Amendment in these terms: "I don't like to speak in terms of principal (sic), but I can't think of another word and I don't like the Legislature stepping in and changing contracts. Now the PUD's made a contract with the individuals and it traces all the way back to the beginning. I have to rest my case on that point." Remarks of Senator Moore. App. at 124.

The court below characterized plaintiffs' argument to be that "the negligence standard existing prior to the RCW 21.20. 430(7) amendment became a part of their bond contracts because their bond purchases pursuant to the contracts were made in contemplation of existing law." Failing to accept the logic of this argument, the court below stated: "(W)here a general statute involved provides a remedy, which is later changed, the previous remedy will not ordinarily be implied

as an unexpressed term of an otherwise express contract. (Citation omitted)." App. at 39-40.

The Washington Supreme Court then set forth two specific grounds for rejecting plaintiffs' Contracts Clause argument. It declared that the strict liability negligence standard existing prior to the enactment of S. 3990 "was not expressly incorporated as a term of the bond contract" and held that the previous standard of proof was not an important reason for favorable bond ratings or an important factor in investment decisions to purchase WPPSS 4/5 bonds. App. at 40.

The judgment of the court below insulates Washington State municipal officials and municipalities from the liability to which they were subject under contract principles at the time WPPSS 4/5 bonds were issued. But the constitutional mischief it causes goes much further. By its plain language, the Scienter Amendment shields from liability municipal "employees" and "agents" — persons which in this case arguably inlude an institutional investment advisor, Blyth Eastman, Paine Webber, Inc., Ernst & Whinney, a national accounting firm, and three national engineering firms, two of whom are subsidiaries of Fortune 500 corporations.

STATEMENT OF GROUNDS FOR PLENARY CONSIDERATION

History and Construction of Contracts Clause

The Constitutional Framers proposed Art. I, § 10, cl. 1 as a means of prohibiting all "retrospective interferences" in contractual relationships. *The Records of the Federal Convention of 1787*, Vol. II, p. 439.[7] The Contracts Clause was construed

[7]James Madison of Virginia objected to the proposal because he felt that the draft Constitution's prohibition of "ex post facto laws" already precluded such retrospective interferences. *Id.* at p. 440. John Dickinson of

by this Court in early cases to be an absolute bar to state legislation impairing contractually established property rights:

> Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the Framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adoping the [Constitution], have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions of the legislative power of the states are obviously founded on this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each state.

Fletcher v. Peck, 6 Cranch 87, 137-38 (1809) (Marshall C.J.)

Over the years, this Court has continued to view the Contracts Clause as maintaining an "important place in our constitutional jurisprudence." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 15 (1977). Unless the challenged legislation has been shown to serve an overriding public policy, *Home Building & Loan Association v. Blaisdell*, 290 U.S. 395, 434-438 (1934), this Court has struck down state laws retroactively impairing municipal bond and other municipal debt contracts. *See United States Trust Co. v. New Jersey*, 431 U.S. at 19, n.17; *Louisiana v. New Orleans*, 215 U.S. 170 (1909); *Wolff v. New Orleans*, 103 U.S. 358 (1881).

Delaware corrected Mr. Madison. "On examining Blackstone's commentaries, he found that the terms "ex post facto" related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite." *Id.* at pp. 448-449.

Of course, when governmental entities of the state are the contracting parties, as is the case here, appellate courts have looked closely at any proffered justification because it is the state's own self interest that is at stake. In almost every such situation, the reviewing court has found the impairing legislation unreasonable and, therefore, unconstitutional. *See Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 412, n.14 (1983). *See also Continental Illinois National Bank and Trust Co. v. State of Washington*, 696 F.2d 692 (9th Cir. 1983) *appeal denied for want of standing*, 460 U.S. 1077 (1983) (holding that an earlier attempt to impair WPPSS bond contracts violated the Contracts Clause because, *inter alia*, "WPPSS is itself a political subdivision of the State, made up of other political subdivisions . . . We cannot view the contracts beween WPPSS and the plaintiffs as those between private parties. Because the State is a contracting party, we give less deference to its claims of justification for impairment.")

Application of Contracts Clause to S. 3990

The right to sue for return of compensation paid to purchase securities under RCW 21.20.430(1) is a statutory codification of the common law right to rescind a contract based upon negligent or warranty strict liability principles. *See* 3 *Corbin on Contracts* § 613, n.7. Prior to enactment of S. 3990, the civil liability provisions of WSSA provided an express rescission remedy regardless of fault by the seller. *See Kittilson v. Ford*, 93 Wash.2d 223, 608 P.2d 264, 266 (1980) (holding the intent with which a seller of securities makes statements is "irrelevant" under the terms of RCW 21.20. 010(2) and that WSSA is violated merely if the statements made are materially false). As one court has explained, the remedy of rescission under state securities laws is analogous to a contractual action for "breach of warranty or innocent

misrepresentation." Neither "depend upon a showing of the [s]eller's conscious falsity." *Bradley v. Hullander*, 277 S.C. 6, 249 S.E.2d 486 (1978).

The Washington Supreme Court recognized the strict liability imposed by WSSA absent the Scienter Amendment. The court below not only broadly interpreted the term "seller" as used in WSSA "to include those parties who have the attributes of a seller," it also compared WSSA's express liability provisions to Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k. App. at 26. Comparison by the Court below of RCW 21.20.430(1) to Section 11 of the 1933 Act established that all persons who have a direct role in preparing the false and misleading prospectuses for the WPPSS 4/5 bonds are strictly liable to the plaintiffs as victimized investors if the enactment of the Scienter Amendment is held to violate their contract rights.[8]

Succintly put, U.S. Const., Art. I, § 10, cl. 1 is implicated in this case because passage of the Scienter Amendment eliminated a contractual cause of action. Proof of fraud, as is mandated by S. 3990, requires significantly different and more detailed evidence than a contract rescission claim based on misrepresentation. *Mary Pickford Co. v. Bayly Brothers, Inc.*, 12 Cal.2d 501, 86 P.2d 102, 110-111 (1935).

The question presented by this appeal was expressed by the court below in the following language: "Initially, we note that in situations where statutes govern the interpretation and

[8]As stated in *Herman & McLean v. Huddleston*, 459 U.S. 375, 381-382 (1983), "[Section 11) was designed to assure compliance with the disclosure provisions of the [1933] Act by imposing a strict standard of liability on the parties who play a direct role in a registered offering. . . . Liability against the issuer of a security is virtually absolute." *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 200 (1976) (Section 11 of the 1933 Act creates an express liability for misleading statements by an issuer in a prospectus regardless of fault).

enforcement of private agreements, such statutes may create contractual rights. . .'' App. at 39.

After acknowledging the force of plaintiffs' Contracts Clause argument, the Washington Supreme Court then advanced two grounds for upholding the constitutional validity of the Scienter Amendment. It declared first that Washington State laws existing when WPPSS 4/5 bonds were sold had not been incorporated in the bond contract and second that it ''did not believe that the negligence standard of liability in force at the time of the bond purchases was an important reason for favorable bond ratings or . . . in the bondholders' decisions to purchase the bonds.'' App. at 40.

The first ground is factually wrong. The laws of the State of Washington were specifically incorporated into the bond indenture for WPPSS 4/5 bonds. Section 14.1 of Resolution 890 not only makes this explicit but represents that ''in consideration of the purchase'' of WPPSS 4/5 bonds: ''*[the laws of the State of Washington] shall constitute a contract with the holder* or *holders of each Bond* . . . and the obligation of [WPPSS] under said law shall be *enforceable by any court of competent jurisdiction* . . .'' App. at 129. (Emphasis Added)

The second articulated ground is conceptually wrong. It engrafts on municipal contract law a reliance requirement not generally held to exist in contractual relationships where the intent of the parties is expressed in the bond contract itself. ''It is perfectly clear, that any law which enlarges, abridges, *or in any manner changes the intention of the parties resulting from the stipulations in the contract,* necessarily impairs it.'' 2 Story, *Commentaries on the Constitution* (4th Ed.) § 1385, at 245 (Emphasis added).

Plaintiffs do not assert their Contracts Clause challenge solely on the general proposition that laws existing at the time

and place of the making of a bond contract enter into and form a part of it. Their constitutional claim on this appeal is securely anchored upon binding stipulations made by WPPSS in the bond contract. These agreements are property rights that should be protected against confiscation by state legislatures. *Cf. Contributors to the Pennsylvania Hospital v. Philadelphia*, 245 U.S. 20, 22-23 (1917) (holding contract rights are property rights which can only be taken by a state if just compensation is paid); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (holding a cause of action is a species of property protected by the constitution).

In considering whether plaintiffs' contract rights to rescind WPPSS 4/5 bonds were impaired, the court below failed to acknowledge the improper motive of the Washington State legislature. The Scienter Amendment serves no general social purpose. Only the narrow parochial interests of WPPSS, its members, and its retained professionals — the very persons alleged to be responsible for preparing false Official Statements and Annual Reports used to sell WPPSS 4/5 bonds — are served by the shield of S. 3990. As this Court aptly stated long ago: "It is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts." *Ogden v. Saunders*, 12 Wheaton 213, 291 (1827).

It is difficult to conceive how retroactive application of the Scienter Amendment meets any legitimate public policy reasonably required to protect the welfare of Washington municipal officials or ratepayers. Protection from liability of municipal officials could have been accomplished by giving them qualified immunity from suits under WSSA.[9] Ratepayers could have

[9]Indeed, before passage of the Scienter Amendment, RCW 21.20.430(7) had been amended in 1981 to preclude recovery under WSSA against certain municipal officials absent proof of scienter. [Laws of 1981, Ch. 272, § 9]

been shielded from increases in electric charges attributed to the WPPSS 4/5 bond debacle by limiting the ability of Washington State municipalities and PUDS to pass through their costs.

Even if concerns for municipal officials and ratepayers could qualify as a necessary social purpose, the sweeping language of the Scienter Amendment brings private parties not the proper concern of state legislatures within its ambit. It shields from the strict liability provisions of WSSA virtually every person connected with WPPSS — including "agents" and "employees" such as WPPSS' investment adviser, accountants, engineers and attorneys. While a state should not be unduly restricted in its ability to legislate so as to safeguard the vital interests of its people, *El Paso v. Simmons*, 379 U.S. 497, 508 (1965), it is "not completely free to consider impairing the obligations of . . . contracts on a par with other policy alternatives." *United States Trust Co. v. New Jersey*, 431 U.S. at 30-31. *Accord Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-248 (1978).

The enactment of S. 3990 by the Washington State legislature is a classic example of an unconstitutional retrospective interference with contract rights resulting from the "sudden and strong passions to which men are exposed." *Fletcher v. Peck*, 6 Cranch at 138. Retroactive elimination of plaintiffs' strict liability cause of action under WSSA by the Washington State legislature substantially and unreasonably impairs contract rights expressly made part of WPPSS Resolution 890. Protection of the property rights of thousands of WPPSS 4/5 bond purchasers calls for this Court's immediate attention.

CONCLUSION

For the reasons stated above, this Court should note probable jurisdiction over this appeal, require briefs on the merits and oral argument or grant such other and further relief as would be appropriate in the premises.

Respectfully submitted,

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Dated: May 19, 1988

SCHEDULE OF ALL PARTIES TO PROCEEDINGS BELOW

Appellant-plaintiffs Fredric Haberman include:

Individuals, Estates and Trusts (showing state of resident):

Fredric Haberman, M.D., a New Jersey Resident; Claude Purvis, a Washington Resident; Nerou Cheng, a New York Resident; Ted R. Pape, a Washington Resident; Aubrey L. Moss, a New Jersey Resident; John H. Biggs, a New Jersey Resident; Nicholas C. Dascoli, a New Jersey Resident; Arnold Goldberg, a New Jersey Resident; Frederick J. Gormley, a New Jersey Resident; Irving J. Gross, a New Jersey Resident; Rose Gross, a New Jersey Resident; Edward Kawash, a New Jersey Resident; Frank T. Kiel, a New Jersey Resident; Martin I. Schwartz, a New Jersey Resident; Kenneth C. Washburne, a Texas Resident; Jack B. Weinberger, a Texas Resident; Alice W. Wise, a New Jersey Resident; Lloyd W. Wise, a New Jersey Resident; Norma Sandison, a Washington Resident; Daniel Gelfond, a New York Resident; Jeanne Christopher, a Washington Resident; John S. Christopher, a Washington Resident; Grace Freeman Rosen, a California Resident; Leo Freeman, a California Resident; George M. Hrunka, a New Jersey Resident; Charles M. Judge, a New Jersey Resident; Peter Madan, a New Jersey Resident; Peggy Ann Madan, a New Jersey Resident; Robert W. Madan, a New Jersey Resident; William A. Keyser, a New Jersey Resident; Marguerite E. Keyser, a New Jersey Resident; Marguerite E. Keyser, POA for Francis J. Herron, a New Jersey Resident; Merton S. Freeman, a California Resident; James Korsten, M.D., a New Jersey Resident; Albert Baker, a California Resident; Barbara Jentis, a New Jersey Resident; Leigh E. Dunn, a California Resident; Rachel S.

Dunn, a California Resident; Howard L. Ray, a Washington Resident; Daniel A. Berkoff, a California Resident; Albert B. Berkoff, a California Resident; George C. Ganzberg, a California Resident; Gabriel A. Calenda, a New Jersey Resident; Charles Zeidner, a New Jersey Resident; Corinne S. Corwin, a California Resident; Lucille Zager, a California Resident; Fay Freeman, a California Resident; Ronald Klinger, a New York Resident; Robert Luban, a New Jersey Resident; Carson L. Shade, a California Resident; David Fiske, M.D., a California Resident; Albert W. Thompson, M.D., a California Resident; Jack Schaefer, a Nevada Resident; Robert L. Mast, a New Jersey Resident; Loretta Steinbach, a California Resident; Robert N. Wright, a California Resident; Jacob Malit, a Florida Resident; Doris Malit, a Florida Resident; Al Groschen, a California Resident; Marvin Neben, a California Resident; Shirley Neben, a California resident; William C. Starrett, II, a California Resident; Arthur Brown, a Florida Resident; Arthur Brown, Trustee for 1979 Ethel Glazer Trust, a Florida Resident; Saul M. Ferman, a California Resident; Jack A. Schaps, a California Resident; Leon Fein, a California Resident; Lawrence W. Pendelton, a California Resident; Imon R. Gammage, a Washington Resident; Lucy E. Gammage, a Washington Resident; Dave Rosenthal, a California Resident; Bernie Rosenthal, a California Resident; Albert M. Grathwol and John D. Grathwol, Trustees of the Mr. and Mrs. Albert M. Grathwol Trust of 1981, a California Resident; Kira Fomenko, a California Resident; Abraham G. Luboff, a California Resident; Deborah R. Luboff, a California Resident; William D. Cane, a Montana Resident; Charles F. Dester, a California Resident; Albert Caponetto, a Nevada Resident; Harold B. Hogle, a Washington Resident; G. Ralph Bartolme, Esq., a California Resident; George Tomasini, a California Resident; Albert R. Cox, a Texas

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Daniels, a Florida Resident; Blanche Daniels, a Florida Resident; Merlin C. Perkins, a Utah Resident; Anthony Riccardello, a New Jersey Resident; William Hauptman, a New Jersey Resident; Dr. Alfred J. Cinelli, a New Jersey Resident; Gayle M. Schubac, trustee for Judy Radcliffe, a California Resident; Gayle M. Schubach, trustee for Henry Schubach, a Utah Resident; Gertrude Schwartz, a New Jersey Resident; W.T. Cummins, a Kentucky Resident; Joe Aggio, a California Resident; Rosalia Aggio, a California Resident; Florence Elliott, a California Resident; Florence Savin, Trustee for Madeline Hecht, a Connecticut Resident, Karl B. Kluge, an Arizona Resident; Geraldine V. Kluge, an Arizona Resident; Edward D. Meigs Trust, UDT dated 7/8/82, an Arizona Resident; Garth Living Trust, a California Resident; Saul Haimowitz, a California Resident; Ruth Haimowitz, a California Resident; Westmount Properties, a California Resident; Saul Haimowitz, Inc., Employees Retirement Trust Fund, a California Resident; Robert F. McNulty, a California Resident; Fred R. Jueneman or Rodney W. Jueneman, Co-trustees UAD 9/14/77, a California Resident; Yale M. Leavy, a Florida Resident; Edwin L. Garthwaite, a California Resident; Arthur Hargrave, a California Resident; Eugene E. Koubeck, a California Resident; Richard L. Bakman, a California Resident; Lois Gregory, a California Resident; James P. Devere, a California Resident; Richard F. Hamilton, a California Resident; Jean Needham, a California Resident; William P. Allen, an Arizona Resident; Helene P. Allen, an Arizona Resident; Edward C. Forsyth, a California Resident; Ed Daniels, a California Resident; Richard Fuchslin, a California Resident; Helen Taylor, a California Resident; and E. Nicholas Sargent, M.D., a California Resident.

Corporations listed in accordance with Rule 28.1

Parent Companies, Subsidiaries (except wholly owned) and Affiliates of Corporate Appellants

American Family Life Assurance Company of Columbus
Parent – American Family Corporation
Non-wholly owned subsidiary of American Family Corporation: Pan American Family Insurance Corporation

American States Insurance Company
Insurance Company of Illinois
The Lincoln National Life Insurance Company
Parent – Lincoln National Corporation
Non-Wholly owned subsidiary of The Lincoln National Life Insurance Company:
Employers Health Insurance Company
Health Horizons, Inc.

American Economy Insurance Company
Parent – American Economy Insurance Company is a wholly owned subsidiary of American States Insurance Company

Chicago Title Insurance Company
was wholly owned subsidiary of Lincoln National Corporation sold to Allegheny Corp.

Audubon Indemnity Company
United Guaranty Corporation
Parent – American International Group, Inc.

Balboa Insurance Company
Provident Alliance Life Insurance Company
Parent – Balboa Insurance Company and Provident Alliance Life Insurance Company are wholly owned subsidiaries of Avco Financial Services, Inc., which is a wholly owned subsidiary of Textron, Inc.

B.M. Behrends Bank

Barnett Banks Trust Co., N.A.
Parent – Barnett Banks Incorporated

The Broad Street National Bank of Trenton – changed to First Jersey National Bank/Central
Parent – National Westminister Bank Corp. New Jersey

Brown County State Bank
Parent – Maurice L. Quinn Properties, Inc.

Central National Insurance Company of Omaha
Parent – Central National Insurance Company of Omaha is a wholly owned subsidiary of Drum Financial Corporation, which is a wholly owned subsidiary of Professional Underwriters Investment Company

Cielo Vista Bank

Colonial Penn Insurance Company
Colonial Penn Life Insurance Company
Parent – Colonial Penn Insurance Company, Colonial Penn Life Insurance Company and Intramerica Life Insurance Company are wholly owned subsidiaries of Colonial Penn Holdings, Inc., which is a wholly owned subsidiary of Colonial Penn Group, Inc., which is a wholly owned subsidiary of FPL Group Capital, Inc., which is a wholly owned subsidiary of FPL Group, Inc.

Coronado Bank
Parent – TN Bancshares, Inc.
Affiliate – Texas National Bank

Empire Fire & Marine Insurance Company
Parent – Zurich Insurance Company

Farm Bureau Mutual Insurance Company of Michigan
Affiliates:
Michigan Farm Bureau
Farm Bureau Life Insurance Company of Michigan
F.B. Annuity Company
Farm Bureau General Insurance Company of Michigan
Farmers Petroleum Cooperative, Inc.
Farmers Crude Production Company
Corporate Services, Inc.
Community Service Acceptance Corp.

Farmers State Savings Bank
Parent – Fidelity Ban Corporation

1st Source Bank
Parent – 1st Source Corporation

First Fidelity Bank, National Association, New Jersey
Parent – First Fidelity Bancorporation
Non-Wholly owned subsidiaries:
. The Treasurer, Inc.
T. Towers, A.C., Inc.
Allied International Bancorp., Inc.
Allied Bank International

Camden Fire Insurance Association
General Accident Insurance Company
Pennsylvania General Insurance Company
Potomac Insurance Company of Pennsylvania
Parent – General Accident Fire & Life Assurance Corporation, P.L.C.

Criterion Insurance Company – changed to GEICO Indemnity Company
Parent – GEICO Indemnity Company is a wholly owned subsidiary of Government Employees Insurance Company which is a wholly owned subsidiary

of GEICO Corporation
Non-Wholly Owned Subsidiary:
AVEMCO Corporation
AVEMCO Insurance Company

Government Employees Insurance Company
Parent – GEICO Corporation
Non-Wholly Owned Subsidiaries:
Bond Investors Group, Inc.
Bond Investors Guaranty Insurance Company
Polaris Syndicate Corporation

Citizens Insurance Company of America
Parent – The Hanover Insurance Company

The Hanover Insurance Company
Parent – The Hanover Insurance Company is a partially-owned (51.3%) subsidiary of SMA Financial Corp. The remaining 48.7% of The Hanover Insurance Company is publicly owned. SMA Financial Corp. is wholly owned by State Mutual Life Assurance Company of America
Non-wholly owned subsidiaries:
Beacon Insurance Company of America
California Compensation & Fire Company

Harleysville Mutual Insurance Company (parent)
Affiliates:
Colonial Bank – Northern Region
Colonial Bank of Montgomery
Colonial Bank – Gulf Coast
Colonial Building Corporation

Mercantile National Bank of Indiana
Parent – Mercantile Bancorp, Inc.

Midlantic National Bank

Midlantic National Bank/North
Parent – Midlantic National Bank and Midlantic National Bank/North are wholly owned subsidiaries of Midlantic Banks Inc., which is a wholly owned subsidiary of Midlantic Corporation

Modern Service Insurance Company
Mutual Service Casualty Insurance Company
Parent – MSI Insurance Company

The Morris County Savings Bank
Parent – First Fidelity Bancorporation

NCNB Bancorporation, Inc.
Parent – NCNB Florida Bancorp, Inc.
Non-wholly owned subsidiary:
Eastern National Bank

North Carolina Farm Mutual Insurance Company

Pennbank/Erie – now known as
Pennbank
Parent – Pennbancorp
Affiliates:
First Seneca Bank
Gallatin National Bank
Pennbancorp Brokerage Services Company
Pennbancorp Investment Company
Pennbancorp Life Insurance Company
United Data Services, Inc.

Pennsylvania National Mutual Casualty Insurance Company (parent)

Philadelphia National Bank
Parent – CoreStates Financial Corp

Philadelphia Savings Fund Society – now known as Meritor Savings Bank

Progressive Casualty Insurance Company
Parent – The Progressive Corporation
Affiliates:
Progressive County Mutual Insurance Company
Progressive Mutual Insurance Company

Prudential Property & Casualty Insurance Company
Prudential Reinsurance Company
Parent – The Prudential Insurance Company of America

Commonwealth Land Title Insurance Company
Reliance Insurance Company
Parent – Reliance Financial Services Corporation

Planet Insurance Company
Parent – Reliance Insurance Company

Regent Insurance Company
Parent – General Casualty Company of Wisconsin

Rockwood Insurance Company
Parent – Rockwood Holding Company

SouthTrust Bank of Baldwin County
SouthTrust Bank of Calhoun County
SouthTrust Bank of Dothan
SouthTrust Bank of Etowah County
SouthTrust Bank of Huntsville
SouthTrust Bank of Marion County
SouthTrust Bank of Mobile
SouthTrust Bank of Sand Mountain
SouthTrust Bank of Selma
SouthTrust Bank of Alabama, N.A.
Parent – SouthTrust Corporation
Affiliates:
SouthTrust Bank of Andalusia
SouthTrust Bank of Arab

SouthTrust Bank of Auburn
SouthTrust Bank of Central Alabama
SouthTrust Bank of Clay County
SouthTrust Bank of Cleburne County
SouthTrust Bank of Coffee County
SouthTrust Bank of Covington County
SouthTrust Bank of Cullman
SouthTrust Bank of Decatur
SouthTrust Bank of Hartselle
SouthTrust Bank, Montgomery
SouthTrust Bank of Ozark
SouthTrust Bank of the Quad Cities
SouthTrust Bank of Randolph County
SouthTrust Bank of Talladega County
SouthTrust Bank of Tuscaloosa County
SouthTrust Bank of Walker County
SouthTrust Bank National Bank
SouthTrust Bank of Central Florida
SouthTrust Bank of Jackson County
SouthTrust Bank of Jacksonville
SouthTrust Bank of Pinellas County
SouthTrust Bank of Tampa
SouthTrust Bank of Volusia County
Vista Bank of Volusia County
SouthTrust Brokerage Services Inc.
SouthTrust Data Services Inc.
SouthTrust Financial Services Inc.
SouthTrust Insurance Agency Inc.
SouthTrust Leasing Inc.
SouthTrust Life Insurance Co.
SouthTrust Mobile Services Inc.
SouthTrust Mortgage Corporation

Stein Roe Tax Exempt Bond Fund, Inc.

Suburban Trust & Savings Bank

Textile Financial Corp.

Union Bank & Trust Co. – now known as
NBD Grand Rapids, N.A.
Parent – NBD Bancorp, Inc.
Affiliates:
Chung Hua Bills Finance Corporation
Michell NBD Limited
NBD Asia Ltd.

Union Safe Deposit Bank (parent)

United Jersey Bank
Parent – United Jersey Banks

Wausau Insurance Companies
– trade name for all Wausau companies – not a legal entity

Employers Insurance of Wausau, A Mutual Company (parent)
Affiliates:
Nationwide Insurance Company
Nationwide Mutual Insurance Company

Wausau Underwriters Insurance
Parent – Wausau Underwriters Insurance is a wholly owned subsidiary of Wausau Service Corp., which is a wholly owned subsidiary of Employers Insurance of Wausau, A Mutual Company

World-Wide Underwriters Insurance Company
formerly a wholly owned subsidiary of Employers Insurance of Wausau, A Mutual Company; Employers Insurance of Wausau holds a power of attorney authorizing it to continue prosecution of this suit on behalf of World-Wide Underwriters Insurance Company

Wemple State Bank

Appellant-intervenors American Express Travel Related Services Company, et al. ("Amexco/US") include:

American Express Travel Related Services Company, Inc., American Express International Bank Corporation, Fireman's Fund Insurance Company, Associated Indemnity Corporation and United States Trust Company of New York.**

Appellee-defendants Washington Public Power Supply System, et al. are:

Washington Public Power Supply System, Public Utility District No. 1 of Benton County, Washington; Public Utility District No. 1 of of Chelan County, Washington; Public Utility District No. 1 of Clallam County, Washington; Public Utility District No. 1 of Clark County, Washington; Public Utility District No. 1 of Cowlitz County, Washington; Public Utility District No. 1 of Douglas County, Washington; City of Ellensburg, Washington; Public Utility District No. 1 of Franklin County, Washington; Public Utility District No. 1 of Grant County, Washington; Public Utility District No. 1 of Grays Harbor County, Washington; Public Utility District No. 1 of Klickitat County, Washington; Public Utility District No. 1 of of Lewis County, Washington; Public Utility District No. 1 of Mason County, Washington; Public Utility District No. 1 of Okanogan County, Washington; Public Utility District No. 1 of Pacific County, Washington; City of Richland, Washington; Public Utility District No. 1 of Skamania County, Washington; Public Utility District No. 1 of

**Plaintiffs hereby incorporate by reference the listing of the parents and subsidiaries of Amexco/US found in the Jurisdictional Statement filed by their attorneys of record on this appeal.

Snohomish County, Washington; City of Tacoma, Washington; Public Utility District No. 1 of Wahkiakum County, Washington; City of Seattle, Washington; Public Utility District No. 1 of of Ferry County, Washington; Public Utility District No. 1 of Kittitas County, Washington; Central Lincoln People's Utility District, Oregon; Clatskanie People's Utility District, Oregon; Public Utility District No. 3 of Mason County, Washington; Northern Wasco County People's Utility District, Oregon; Public Utility District No. 1 of Pend Orielle County, Washington; Tillamook People's Utility District, Oregon; Vera Irrigation District No. 15, Washington; City of Bandon, Oregon; City of Blaine, Washington; City of Bonners Ferry, Idaho; City of Burley, Idaho; City of Canby, Oregon; City of Cascade Locks, Oregon; City of Centralia, Washington; City of Drain, Oregon; City of Heyburn, Idaho; City of Idaho Falls, Idaho; Town of McCleary, Washington; City of McMinnville, Oregon; City of Milton-Freewater, Oregon; City of Port Angeles, Washington; City of Rupert, Idaho; City of Springfield, Oregon; Town of Steilacoom, Washington; City of Sumas, Washington; Adler Mutual Light Company, Washington; Benton Rural Electric Association, Washington; Big Bend Electric Cooperative, Inc., Washington; Blachlylane Electric Cooperative Association, Oregon; Central Electric Cooperative, Inc., Oregon; Clearwater Power Company, Idaho; Columbia Basin Electric Cooperative, Inc., Oregon; Columbia Rural Electric Association, Inc., Oregon; Consumers Power, Inc., Oregon; Coos-Curry Electric Cooperative, Inc., Oregon; Douglas Electric Cooperative, Inc., Oregon; Elmhurst Mutual Power and Light Company, Washington; Fall River Rural Electric Cooperative, Inc., Idaho; Glacier Electric Cooperative, Montana; Hood River Electric Cooperative, Oregon; Idaho County Light & Power Cooperative Association, Inc., Idaho; Inland Power & Light Company,

Washington; Kootenai Electric Cooperative, Inc., Idaho; Lane Electric Cooperative, Inc., Oregon; Lincoln Electric Cooperative, Inc., Washington; Lost River Electric Cooperative, Inc., Idaho; Lower Valley Power & Light, Inc., Wyoming; Midstate Electric Cooperative, Inc., Oregon; Missoula Electric Cooperative, Inc., Montana; Nespelem Valley Electric Cooperative, Inc., Washington; Northern Lights, Inc., Montana; Ohop Mutual Light Company, Washington; Okanogan County Electric Cooperative, Inc., Washington; Orcas Power & Light Company, Washington; Parkland Light & Water Company, Washington; Prairie Power Cooperative, Inc., Idaho; Raft River Rural Electric Cooperative, Inc., Idaho; Ravalli County Electric Cooperative, Inc., Montana; Rural Electric Company, Idaho; Salem Electric, Oregon; Salmon River Electric Cooperative, Inc., Idaho; Tanner Electric, Washington; Umatilla Electric Cooperative Association, Oregon; Unity Light and Power Company, Washington; Vigilante Electric Cooperative, Inc., Montana; Wasco Electric Cooperative, Inc., Washington; Wells Rural Electric Company, Nevada; West Oregon Electric Cooperative, Inc., Oregon; Ernst & Whinney, CPA's; Blyth, Eastman, Paine, Webber, Inc.; Donald C. Patterson, III; Stanley T. Pardo; Paine, Webber, Inc., Paine, Webber, Jackson & Curtis, Inc.; R.W. Beck & Associates; United Engineers And Constructors, Inc.; Ebasco Services, Inc.; Wood & Dawson; Houghton, Cluck, Coughlin & Riley

Additional appellee:

Chemical Bank in its capacity as bond trustee for Washington Public Power Supply System Nuclear Projects 4 and 5 Bonds.

87 1897

No.

Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

FREDRIC HABERMAN, *et al.*,
Appellants,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,
Appellees.

On Appeal From the Supreme Court of Washington

APPENDIX TO JURISDICTIONAL STATEMENT

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XIII. PERTINENT EXCERPTS OF WASHINGTON STATE SECURITIES ACT CIVIL LIABILITY PROVISIONS PERTAINING TO APPEAL OF APPELLANTS FREDERIC HABERMAN, *ET AL*. 247a

OPINION AND JUDGMENT DATED OCTOBER 8, 1987 OF THE WASHINGTON SUPREME COURT AS REPORTED AT 109 Wn.2d 107

[No. 52559–5. En Banc. October 8, 1987.]

FREDRIC HABERMAN, ET AL, *Appellants*, v. WASHINGTON PUBLIC POWER SUPPLY SYSTEM, ET AL, *Respondents*.

[1] **Dismissal and Nonsuit — Failure To State Claim — Factual Basis — Hypothetical Facts.** Dismissal of an action for not stating a claim upon which relief can be granted under CR 12(b)(6) is appropriate only if beyond doubt the plaintiff could not prove any set of facts, including facts outside the record which are consistent with the complaint, which would entitle him to relief.

[2] **Dismissal and Nonsuit — Failure To State Claim — Conversion to Summary Judgment — Relevance of Matters Outside Pleadings.** A trial court's consideration of materials outside the complaint does not convert a motion to dismiss for failure to state a cause of action under CR 12(b)(6) into a motion for summary judgment under CR 56 if the court concludes that the plaintiff cannot obtain relief no matter what facts he proves.

[3] **Judgment — Res Judicata — Prior Determination.** The doctrine of res judicata bars only those claims which necessarily were decided in a previous action.

[4] **Bonds — Securities Regulation — Security — Bond Guaranty.** A public instrumentality's indirect bond guaranty

which could not be purchased separately from the bonds does not constitute a security independent of the bonds themselves.

[5] **Securities Regulation — Statutory Provisions — Construction — Purpose.** The Securities Act of Washington (RCW 21.20) is construed broadly to carry out its purpose of protecting investors.

[6] **Securities Regulation — Civil Remedy — "Seller" — Privity — Necessity.** Under RCW 21.20.430(1), which makes sellers of securities civilly liable for unlawful sales, a party qualifies as a "seller" if his acts were a substantial contributive factor in the sales transaction.

[7] **Conflict of Laws — Securities Regulation — Choice of Law — Significant Contacts.** A securities claim is governed by the law of the jurisdiction having the most significant relationship with the security. The significance of the relationship depends on the competing jurisdictions' contacts with the events giving rise to the claim and the interests and policies of the jurisdictions.

[8] **Commerce — State Regulation — Validity — Factors.** The validity of a state regulation under the commerce clause depends on the relationship between the state, the subject matter, and the parties; the existence of a conflict between the state and federal regulations; and the degree of the burden placed on interstate commerce in relation to the local interests served.

[9] **Statutes — Validity — Presumption — Burden of Proof.** A party challenging the validity of a statute must overcome the presumption that the statute is constitutional by proving its invalidity beyond a reasonable doubt.

[10] **Constitutional Law — Equal Protection — Classifications — Minimal Scrutiny — Test.** A statutory classification not involving a suspect class or a fundamental right does not violate the equal protection guaranty if all members of each class are treated alike, there is a reasonable basis for distinguishing between those included in and those excluded from each class, and the classification is rationally related to the purpose of the statute.

[11] **Securities Regulation — Civil Remedy — In-State Public Issuer — Statutory Provisions — Validity.** RCW 21.20-.430(7), which establishes a scienter requirement to hold the State and its subdivisions civilly liable for securities act violations and makes this requirement retroactive, does not violate the constitutional equal protection, special legislation, due process, separation of powers, or impairment of contracts clauses.

[12] **Statutes — Validity — Special Legislation — Test.** A statute establishing a class does not violate the special legislation prohibition of Const. art. 2, § 28(17) if it applies alike to all members within the class and the classification is reasonably related to the purpose of the statute.

[13] **Statutes — Construction — Retroactivity — Due Process — In General.** The retroactive application of a statute violates due process only if it interferes with a vested liberty or property right. A claimant has no vested liberty or property right in the continuation of existing statutory law.

[14] **Statutes — Construction — Retroactivity — Separation of Powers.** A retroactive statutory amendment does not violate the separation of powers doctrine if it establishes new law to be applied to the facts before the court, does not dictate how factual issues are to be decided, and does not affect a final judgment.

[15] **Statutes — Construction — Retroactivity — Impairment of Contracts.** A retroactive statutory amendment changing a remedy does not impair the obligation of a contract executed before the amendment unless the Legislature intended that the statute create private rights of a contractual nature or the remedy was incorporated as a term of the contract.

[16] **Corporations — Derivative Action — Defense — Standing.** In a derivative action, the entity which the plaintiff ultimately seeks to represent has standing to challenge the plaintiff's authority to bring the action.

[17] **Corporations — Derivative Action — Standing — Bondholder — Equitable Right.** A bondholder has no equitable right to bring a derivative action to enforce a right of the bond issuer.

[18] **Corporations — Derivative Action — Standing — Bondholder — Indenture Agreement.** A bondholder's contractual right to bring a derivative action is limited by restrictions in the indenture agreement if the bonds refer to the agreement.

[19] **Corporations — Derivative Action — Standing — Bondholder — Prior Demand on Trustee — Necessity.** When a bond indenture agreement requires bondholders to demand that the bond trustee bring a derivative action to enforce the rights of the issuer, whether the bondholders are excused from the demand requirement before commencing their own derivative action is a decision within the trial court's discretion. The doctrine of futility does not excuse demand if the trustee was involved neither in the wrongdoing sought to be remedied nor in an action arising out of the same facts as the bondholders' derivative action. The demand

requirement is not excused by a running of a statutory limitation period after the bondholders' derivative action is commenced.

[20] **Credit — Creditor's Equitable Action — Condition Precedent.** Absent statutory provisions to the contrary, a creditor must reduce the debt to judgment before bringing an action in equity to satisfy his claim.

[21] **Government — Torts — Sovereign Immunity — Discretionary Acts — What Constitutes.** A governmental body is not immune from tort liability unless its act, omission, or decision involves the formulation of basic policy at an executive level, rather than the implementation of such policy.

[22] **Government — Torts — Public Duty Doctrine — Special Relationship — Class of Persons.** The public duty doctrine does not immunize a governmental body from tort liability for its breach of a duty owed to a particular circumscribed class of persons rather than to the public as a whole.

[23] **Conflict of Laws — Torts — Choice of Law — Sovereign Immunity — Significant Relationship.** A court will apply the most significant relationship test to determine if a foreign jurisdiction's sovereign immunity will bar a tort claim. Among the factors which must be considered are the competing policies of the jurisdictions, the place of the injury, the place where the conduct causing the injury occurred, the residences of the parties, the place where the relationship is centered, and any choice of law provision in the contract out of which the tort claim arose.

[24] **Conflict of Laws — Torts — Choice of Law — Sovereign Immunity — Full Faith and Credit.** The full faith and credit clause does not require the application of a foreign jurisdiction's sovereign immunity unless not to do so would threaten the foreign jurisdiction's ability to govern.

[25] **Conflict of Laws — Comity — Discretion of Court.** The doctrine of comity permits, but does not require, a state to apply the laws of a foreign jurisdiction out of deference and respect after considering the interests of each jurisdiction. Basing a choice of law decision on considerations of comity is a matter within the court's discretion.

[26] **Negligence — Misrepresentation — Elements of Tort.** A party who fails to exercise reasonable care in obtaining or communicating false information involving a transaction in which he has a pecuniary interest is liable for pecuniary loss caused by justifiable reliance on the information if the supplier of the information knows of the injured party's reliance or has special reason to know

that some member of a limited group will rely on the information, or the injured party is a member of a group which the supplier sought to influence.

[27] **Fraud — Complaint — Specificity — Test.** A complaint seeking damages for common law fraud satisfies the particularity requirement of CR 9(b) if it describes the fraud, alleges that the defendant committed it, and gives the defendant sufficient notice to allow him to prepare an answer and defense.

[28] **Fraud — Misrepresentation — Scope of Duty — Privity.** A person who fraudulently conceals or misstates information in a business transaction is liable to persons whom the person intends or has reason to expect will be misled by his acts. Privity or a fiduciary relationship between the parties is not a condition precedent to liability in such a situation.

[29] **Attorney and Client — Consumer Protection — Law or Other Professional Practice — Scope — Malpractice.** A claim for damages based on an attorney's or other professional's negligence in the exercise of his judgment is not cognizable under the Consumer Protection Act (RCW 19.86).

[30] **Waters — Irrigation Districts — Status — Municipal Corporations.** Irrigation districts established pursuant to RCW Title 87 qualify as municipal corporations.

[31] **Utility Services — Consumer Protection — Scope — Rural Electric Cooperatives.** Rural electric cooperatives are immune from liability under the Consumer Protection Act (RCW 19.86).

[32] **Pleading — Amendment — Relation Back — New Parties — Plaintiffs.** CR 15(c), which governs whether amendments to pleadings relate back to the original filing date for statute of limitation purposes, applies to the claims of newly added plaintiffs as well as newly added defendants.

[33] **Pleading — Amendment — Addition of Party — Inexcusable Neglect.** A complaint may not be amended to add an additional party if the moving party's failure to include the omitted party initially was due to inexcusable neglect. The nonmoving party need not show prejudice from the addition of the additional party.

[34] **Process — Service — Foreign Party — Degree of Compliance.** Service of process on an out-of-state party requires strict compliance with the procedures set forth in RCW 4.28.080(14) and .185. Receipt of process and actual notice do not, by themselves,

establish valid service of process.

PEARSON, C.J., and DOLLIVER and ANDERSEN, JJ., dissent in part by separate opinion; CALLOW, J., did not participate in the disposition of this case.

Nature of Action: Holders of revenue bonds in default which were issued to finance the construction of two terminated nuclear power plants sought damages under multiple theories from various parties involved in the construction and financing of the plants.

Superior Court: The Superior Court for King County, No. 84-2-06452-8, Terrence A. Carroll, J., on October 7, 1985, dismissed the action for failure to state a claim upon which relief could be granted.

Supreme Court: Holding that the bondholders had stated cognizable claims for violation of the state securities act, negligent misrepresentation, and common law fraud, and that the claims of bondholders added by an amendment to the complaint related back to the date the action was filed, the court *affirms* the judgment in part, *reverses* it in part, and *remands* the case to the trial court for further proceedings.

Ferguson & Burdell, by *Christopher Kane* and *Scott Tucker*, and *Thoreson, Yost, Berry & Matthews*, by *Ernest C. Matthews IV* (*Myer Feldman, Robert L. Deitz, Edward J. Tolchin*, and *Ginsburg, Feldman & Bress*; *Robert H. Jaffe, Howard G. Schlesinger*, and *Jaffe & Schlesinger*, of counsel), for appellants Haberman, et al.

Smith, Smart, Hancock & Tabler, by *Walter S. Tabler* (*Winthrop, Stimson, Putnam & Roberts*, by *John B. Daniels, David G. Keyko*, and *Susan J. Kohlmann*, of counsel), for appellants American Express Travel Related Services Co., et al.

Culp, Dwyer, Guterson & Grader, by *Robert D. Stewart*, and *Donovan, Leisure, Newton & Irvine*, by *Daniel R. Murdock*, for respondent Washington Public Power Supply

System.

Helsell, Fetterman, Martin, Todd & Hokanson, by *David F. Jurca* and *Linda J. Cochran*, for Columbia respondents.

Syrdal, Danelo, Klein, Myre & Woods, by *Peter A. Danelo* and *Otto G. Klein III* (*S. William Livingston, Jr., Peter J. Nickles*, and *Covington & Burling*, of counsel); *Davis, Wright & Jones*, by *Evan L. Schwab, Stephen M. Rummage*, and *David C. Tarshes*; *Reed, McClure, Moceri, Thonn & Moriarty*, by *Roy J. Moceri* and *D. Bradley Hudson*; *Karr, Tuttle, Koch, Campbell, Mawer & Morrow*, by *John F. Kruger* (*Bernard J. Smolens, Ralph Wellington, Arden J. Olson*, and *Schnader, Harrison, Segal & Lewis*, of counsel); *Sirianni & Youtz*, by *Chris R. Youtz* and *Stephen J. Sirianni* (*Robert M. Abrahams, Irwin J. Sugarman, Robert E. Bartkus*, and *Schulte, Roth & Zabel*, of counsel); *Williams, Kastner & Gibbs*, by *J. Kenneth McMullin* (*James J. Hagan, Elizabeth A. York*, and *Simpson, Thacher & Bartlett*, of counsel), for respondents Ebasco Services, Inc., et al.

Riddell, Williams, Bullitt & Walkinshaw, by *John D. Lowery, Hugh R. Tobin*, and *David R. Peeler*, for respondents Small Utilities Group.

Foster, Pepper & Riviera, by *Camden M. Hall, Stellman Keehnel*, and *Daniel L. Thieme*; *Culp, Dwyer, Guterson & Grader*, by *Robert D. Stewart*; *Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim*, by *Albert R. Malanca* and *Donald S. Cohen*; *Harris, Mericle & Orr*, by *Jack G. Orr* (*Dennis K. Bromley, Robert A. Gordon*, and *Pillsbury, Madison & Sutro*, of counsel), for respondents Utility Defendants.

Lane, Powell, Moss & Miller, by *Larry S. Gangnes, John R. Tomlinson*, and *Paul D. Swanson* (*Rockne Gill, J. Laurence Cable, Bernard M. Ryan*, and *Schwabe, Williamson, Wyatt, Moore & Roberts*; *R. Erick Johnson, R. Daniel Lindahl*, and *Bullivant, Houser, Bailey, Hanna, Pendergrass,*

Hoffman, O'Connel & Goyak; *Peter R. Mersereau* and *Rankin, McMurry, Vavorsky & Doherty*, of counsel), for respondents Oregon Public Entities.

Hillis, Cairncross, Clark & Martin, P.S., by *Michael F. Schumacher* and *Gregory E. Keller*, for respondents Inland Utilities.

Bennett & Bigelow, by *David A. Bennett* and *Elizabeth J. Blagg*, for respondent Dawson.

Jim Jones, Attorney General for the State of Idaho, and *Clive J. Strong, Deputy*, amici curiae.

BRACHTENBACH, J.—This case involves various bondholders' claims against the Washington Public Power Supply System (Supply System) and others for injuries resulting from the Supply System's default on $2.25 billion in revenue bonds issued to finance construction of two nuclear power generating plants. The trial court dismissed all bondholders' claims for their failure to state a claim for relief pursuant to CR 12(b)(6). We granted direct review and reverse the trial court's judgment on several issues.

Respondent Supply System is a "joint operating agency" and municipal corporation established and authorized by state law to finance, construct, own and operate electrical generating facilities. *See* RCW 43.52.360. Its members are 19 public utility defendants and four cities.

In the early 1970's, the Supply System began construction of three nuclear power generating plants WNP 1, WNP 2 and WNP 3. Those plants were developed in conjunction with a number of participating utilities from several northwestern states, including Washington. The Bonneville Power Administration (BPA), a federal agency, facilitated financing of the first three plants through complex "net-billing" agreements that allocated the risk of noncompletion to the federal agency, combined the costs of the nuclear plants' construction with less costly hydropower, and resulted in an indirect guaranty by BPA. *See Chemical Bank v. WPPSS*, 99 Wn.2d 772, 779, 666 P.2d

329 (1983) (*Chemical Bank* I).

By 1974, it appeared that additional electrical power generation facilities would be needed to meet growing northwest power demands. To meet these demands, the Supply System decided that two additional nuclear power plants WNP 4 and WNP 5, would be necessary. WNP 4 was to be owned entirely by the Supply System; WNP 5 was to be owned 90 percent by the Supply System and 10 percent by Pacific Power and Light Company, a private utility.

In addition to the Supply System and Pacific Power and Light Company, 88 "Participants" were involved in these two projects: 9 Washington cities, 19 Washington public utility districts (PUD's), 1 Washington irrigation district, 7 Oregon cities, 4 Oregon peoples' utility districts, 5 Idaho cities, and 43 rural electric cooperatives, of which 13 are in Washington. The remaining rural electric cooperatives are in Idaho, Montana, Nevada, Oregon and Wyoming. These Participants include 20 of the 23 Supply System members.

The Supply System financed construction of WNP 4 and WNP 5 through the sale of revenue bonds. Changes in federal law, however, precluded use of "net–billing" as a security device as used in the WNP 1, WNP 2 and WNP 3 financing. As a result, in 1976 the Participants all entered into a "Participants' Agreement" with the Supply System. In this agreement, the Supply System promised to sell, and each Participant promised to buy its share of WNP 4 and WNP 5 "Project Capability". Project Capability was defined by the Participants' Agreement as:

> the amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses.

Participants' Agreement, section 1(v). In essence, the Participants agreed to pay for their share of Project Capability

regardless whether the projects ever produced electricity.

Each Participant agreed to begin monthly payments for its share commencing with the projects' date of completion, or within 1 year of the projects' termination. The Participants' Agreement also established a Participants' committee through which the Participants could disapprove certain actions taken by the Supply System's board of directors.

In 1977, the Supply System adopted bond resolution 890, a trust indenture which provided for its issuance of a series of revenue bonds to finance the WNP 4 and WNP 5 plants. Resolution 890 appointed a bond trustee, Chemical Bank, to represent the bondholders' interests. Resolution 890 required the Supply System to collect charges for Project Capability from the Participants as agreed in the Participants' Agreement so as to provide for payment of interest due on the revenue bonds issued. The effect of the Participants' Agreement together with resolution 890 was that the Participants indirectly guaranteed debt service on all the bonds issued by promising to purchase their shares of Project Capability once the projects were completed, or within 1 year of termination of construction.

Financing for the plants involved the capitalization of interest on a series of bonds. Under this arrangement, the Supply System would use future bond sales revenue to pay interest due on outstanding bonds until the completion of WNP 4 and WNP 5, when the operating revenues would then pay the debt service on the final series of bonds. Construction of WNP 4 and WNP 5 was originally projected to require $3.4 billion.

The Supply System, along with its investment advisors, prepared Official Statements to accompany the WNP 4 and WNP 5 bond offerings. These Official Statements contained opinions from engineers and accountants as to the structural and financial feasibility of the plants. Additionally, the Official Statements explained that the Participants were obligated to pay the costs of the plants, including debt service on the bonds, whether or not the plants ever were completed or generating power. The WNP 4 and WNP 5

bonds on their faces referred to resolution 890 and the Participants' guaranties to purchase Project Capability.

The Supply System sold the bonds through a 15–part integrated offering beginning in February 1977. All bonds were sold directly to underwriters pursuant to bidding procedures in RCW 43.52.343. These underwriters then resold the bonds to investors.

WNP 4 was projected to be operational by March 1982; WNP 5 by April 1984. Presumably, the final series of bonds would have been issued so as to coincide with these dates, allowing the operating revenues to pay the debt service obligations on the final series of bonds as originally planned. On May 29, 1981, however, the Supply System announced that because it was not able to obtain bond financing for its nuclear power projects for the following year, and because northwest power demands had not grown as anticipated, it was terminating WNP 4 and WNP 5. The Supply System formally withdrew the 15th bond offering, and announced that the cost estimates contained in the Official Statements issued with the last series of bonds on May 17, 1981, had been understated by approximately $5 billion. Final estimates of completion costs for WNP 4 and WNP 5 had also grown from the original $3.4 billion to nearly $12 billion. On January 22, 1982, the Supply System's board of directors unanimously voted to terminate WNP 4 and WNP 5 due to conditions beyond its ability to control. By that time, bonds outstanding had an aggregate face value of approximately $2.25 billion.

The Supply System's termination of the projects established a trigger date for various debt service payments, which by virtue of the Participants' Agreement and resolution 890, became the Participants' obligations. The estimated amount necessary to service the outstanding bonds is $7 billion.

Chemical Bank, on behalf of the WNP 4 and WNP 5 bondholders, filed a declaratory action to determine the enforceability of the Participants' Agreement. This court determined that all Washington Participants lacked statu-

tory authority to enter into the Participants' Agreement, and declared the Agreement void and unenforceable. *See Chemical Bank* I, at 799. Moreover, this court held that the remaining Participants were released from their obligations under the Participants' Agreement on the basis of commercial frustration or impossibility, and mutual mistake. *See Chemical Bank v. WPPSS*, 102 Wn.2d 874, 888–89, 691 P.2d 524 (1984) (*Chemical Bank* II), *cert. denied*, 471 U.S. 1065, 1075 (1985).

This court denied plaintiffs Fredric Haberman and five others' motion to intervene in *Chemical Bank* II. Subsequently, on May 7, 1984, Haberman and other individual bondholders (plaintiffs) instituted this suit against the Supply System and others for numerous causes of action arising out of the WNP 4 and WNP 5 termination and resulting bond default. A group of institutional bondholders, including American Express Travel Related Services Company, Inc. (Amexco) and United States Trust Company of New York, joined the action as intervenor–plaintiffs (intervenors).

Five basic groups were named as defendants and are respondents on this appeal: the Supply System, the 23 members of the Supply System, Chemical Bank, the 88 WNP 4 and WNP 5 "Participants", and the professionals who rendered services to the Supply System. The respondent professionals include accountants Ernst & Whinney; investment advisors Blyth, Eastman, Paine, Webber, Inc., and its officers Donald Patterson and Stanley Pardo; engineers R. W. Beck and Associates, United Engineers and Constructors, Inc., and Ebasco Services, Inc.; attorneys Wood & Dawson, and Houghton, Cluck, Coughlin & Riley; and other unnamed professionals.

Plaintiffs' and intervenors' complaints allege that all defendants knew or should have known: that the market could not support the extensive bond sales required to finance WNP 4 and WNP 5, and that the financing plan was otherwise insufficient; that the Participants' Agreement was unenforceable or that a declaratory judgment test case

should have been filed to determine its enforceability before the bond issues; that all professionals performed their jobs negligently and rendered inaccurate information to the Supply System; and that predictions of the need for power made by the BPA were inaccurate. Several of plaintiffs' counts were not addressed by the trial court and were not briefed on this appeal.

The complaints reveal several bases upon which these actions are brought: aid in preparation of the Official Statements, which contained misstatements and material omissions; making negligent or fraudulent recommendations regarding need, cost, and feasibility to the Supply System that were placed in the Official Statements and Annual Reports, and were relied upon by the Supply System, bond rating agencies, government agencies, plaintiffs and intervenors; participation in the Supply System board of directors meetings and Participants' committee meetings; and omissions and misstatements regarding the enforceability of the Participants' Agreement.

Both plaintiffs and intervenors alleged violations of The Securities Act of Washington (WSSA), RCW 21.20, and asserted derivative negligent misrepresentation claims. The intervenors also alleged common law negligent misrepresentation, fraud, and violations of the Consumer Protection Act. Plaintiffs also alleged violations of the federal Securities Act of 1933, sought to add new plaintiffs and defendants, and to overturn the trial court ruling that service on Patterson and Pardo was defective.

The trial court dismissed all plaintiffs' and intervenors' claims pursuant to CR 12(b)(6) (failure to state a claim upon which relief may be granted). Plaintiffs and intervenors appealed; we accepted direct review.

I

The Standard of Review

[1] A trial court may grant dismissal for failure to state a claim under CR 12(b)(6) only if "'it appears beyond doubt that the plaintiff can prove no set of facts, consistent

with the complaint, which would entitle the plaintiff to relief.'" *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985); *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984). CR 12(b)(6) motions should be granted "sparingly and with care". *Orwick*, at 254.

A plaintiff's factual allegations are presumed true for purposes of a CR 12(b)(6) motion. *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986); *Bowman*, at 183. A complaint survives a CR 12(b)(6) motion if any state of facts could exist under which the court could sustain the claim for relief. *Lawson*, at 448; *Bowman*, at 183; *Orwick*, at 255. Thus, a court may consider hypothetical facts not part of the formal record in deciding whether to dismiss a complaint pursuant to CR 12(b)(6). *Halvorson v. Dahl*, 89 Wn.2d 673, 675, 574 P.2d 1190 (1978).

CR 12(b)(6), read together with CR 8(a)(1), requires the court to decide whether the allegations in a complaint constitute a short and plain statement of the claim showing that the pleader is entitled to relief. *Orwick*, at 254. The court need not accept legal conclusions as correct. *See Orwick*, at 254; *State ex rel. Pirak v. Schoettler*, 45 Wn.2d 367, 370, 274 P.2d 852 (1954). When an area of the law involved is in the process of development, courts are reluctant to dismiss an action on the pleadings alone by way of a CR 12(b)(6) motion. 3A L. Orland, Wash. Prac. § 5152 (3d ed. 1980).

Notwithstanding the trial court's characterization of its dismissal as pursuant to CR 12(b)(6), respondents argue that because the court considered materials outside the complaint in reaching its decision, the dismissal should have been pursuant to CR 56 (summary judgment). *See* CR 12(b). (CR 12(b)(6) motion is converted into CR 56 summary judgment motion whenever matters outside the pleadings are presented to and accepted by the court.)

[2] While the submission and consolidation of extraneous materials by either party normally converts a CR 12(b)(6) motion to one for summary judgment, if the court can say that no matter what facts are proven within the

context of the claim, the plaintiffs would not be entitled to relief, the motion remains one under CR 12(b)(6). *See Loger v. Washington Timber Prods., Inc.*, 8 Wn. App. 921, 924, 509 P.2d 1009, *review denied*, 82 Wn.2d 1011 (1973). In such a case, the presentation of extraneous evidence would be immaterial. *Loger*, at 924. In *Loger*, the trial judge considered matters outside the pleadings to enable him to understand the context of the CR 12 motion so as to rule on it as a matter of law, without reaching or resolving any factual dispute. *Loger*, at 926.

Plaintiffs and intervenors also argue that the trial court made factual findings. These purported findings were, however, determinations of law based upon the facts alleged in the complaint. We find that although the trial court considered matters extraneous to the complaints, it ruled as a matter of law that plaintiffs and intervenors had not stated a claim and did not make any determination of facts in dispute. We conclude that the proper standard of review remains that required by CR 12(b)(6). We therefore proceed to the remaining issues with this standard of review in mind.

II

Res Judicata Claims

Respondents argue that the doctrine of res judicata bars plaintiffs' and intervenors' claims. We disagree. This court previously determined that the Participants were not liable to repay principal and interest on WNP 4 and WNP 5 bonds because their obligations to do so were ultra vires acts, or unenforceable because of commercial frustration, impossibility, and mutual mistake. *See Chemical Bank* I; *Chemical Bank* II.

[3] Res judicata prevents relitigation of claims already decided. *Meder v. CCME Corp.*, 7 Wn. App. 801, 803, 502 P.2d 1252 (1972), *review denied*, 81 Wn.2d 1011 (1973). While res judicata bars relitigation of claims necessarily a part of a previous matter in controversy, it poses no bar to claims not in fact adjudicated previously. *Seattle-First*

Nat'l Bank v. Kawachi, 91 Wn.2d 223, 226, 588 P.2d 725 (1978).

The prior *Chemical Bank* litigation dealt solely with contract claims between the Supply System and the Participants. No securities, consumer protection, or common law tort claims were at issue. A motion brought by plaintiffs to intervene in the *Chemical Bank* cases was denied as untimely. *See Chemical Bank* II, at 889. We conclude that res judicata does not bar the claims before this court.

III

Federal Securities Act Claims

Plaintiffs argue that the trial court improperly dismissed their federal securities claims. Section 12(2) of the federal Securities Act of 1933, 15 U.S.C. § 77*l*(2), provides a cause of action against any person who "offers or sells a security" through a prospectus containing misrepresentations or omissions. Section 3(a)(2) of the act exempts from section 12 any security issued by a public instrumentality. 15 U.S.C. § 77c(a)(2) (1981). While plaintiffs acknowledge that the WNP 4 and WNP 5 bonds are exempt from section 12, they claim that the Participants' guaranties of those bonds constitute separate securities that are subject to section 12 liability. Plaintiffs contend that whether the guaranties were separate securities was a factual question improperly decided by the trial court on a motion to dismiss.

First, we note that federal courts consistently determine as a matter of law whether investment schemes are securities. *See, e.g., Black v. Payne*, 591 F.2d 83, 86 n.1, 88 (9th Cir.) (affirming Fed. R. Civ. P. 12(b)(6) dismissal because no security involved), *cert. denied*, 444 U.S. 867 (1979); *De Luz Ranchos Inv. Ltd. v. Coldwell Banker & Co.*, 608 F.2d 1297, 1299–1301 (9th Cir. 1979) (question of law whether investment scheme constituted a security); *Mason v. Unkeless*, 618 F.2d 597, 598 (9th Cir. 1980) (dismissal for failure to show a security was involved proper on Fed. R. Civ. P. 12(b)(6) motion); *Frederikson v. Poloway*, 637 F.2d 1147, 1153–54 (7th Cir.), *cert. denied*, 451 U.S. 1017 (1981) (dis-

missal because no security involved); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970) (question of law whether contracts were securities).

[4] Next, we agree with the trial court's conclusion that the Participants' guaranties were not separate securities. A similar argument was rejected in *Woods v. Homes & Structures of Pittsburg, Kan., Inc.*, 489 F. Supp. 1270 (D. Kan. 1980). There, municipal bond purchasers sought to avoid the section 3(a)(2) exemption by arguing that certain insurance company guaranties attached to the bonds as certificates were separate securities subject to section 12(2). *Woods*, at 1292–94. The court noted that the guaranties had not been sold, nor could they have been purchased separately from the bonds. *Woods*, at 1293. The court concluded that the presence of the guaranties did not destroy the exemption created by the Securities Act of 1933 because the bonds were exempt and because the guaranties were part of those bonds. *Woods*, at 1293. *See also Johns Hopkins Univ. v. Hutton*, 422 F.2d 1124, 1128 (4th Cir. 1970).

Here, no separate Participants' guaranty existed. The Participants "guaranteed" only that they would purchase their share of WNP 4 and WNP 5 Project Capability whether or not power was produced. This obligation was an indirect guaranty of the bonds only by virtue of resolution 890, which empowered the Supply System to collect the amounts owed by the Participants pursuant to the Participants' Agreement to pay debt service to the bonds issued. The Participants did not guarantee payment on the bonds directly. The guaranties were neither sold, nor marketed, and could not have been purchased apart from the bonds. We conclude that the guaranties were not separate securities.

Finally, plaintiffs argue that our ruling in *Chemical Bank* I, voiding the Participants' guaranties as ultra vires, converted them into separate, nonexempt securities. This contention is without merit. Our *Chemical Bank* I and II decisions did not hold the guaranties nonexistent; rather we

held the guaranties unenforceable. Even if we assume that the guaranties were somehow "converted" into separate securities, such securities remain exempt from section 12(2) liability because the Participants are all public instrumentalities within the meaning of section 3(a)(2) of the Securities Act of 1933. The trial court's dismissal of plaintiffs' Securities Act of 1933 claims is affirmed.

IV

Securities Act of Washington

Plaintiffs and intervenors allege that all respondents made material misrepresentations and omissions in connection with the bond sales in violation of the Securities Act of Washington (WSSA). They sought recovery pursuant to the civil liability provisions of RCW 21.20.430(1), (3). The trial court dismissed all WSSA claims, holding as a matter of law that no respondent was a seller under RCW 21.20-.430(1); that no respondent controlled a seller within the meaning of RCW 21.20.430(3); and that RCW 21.20.430(7) barred negligence claims against all respondents except bond counsel Wood & Dawson because it requires proof of scienter.

A

Seller Claims Under RCW 21.20.430(1)

Plaintiffs and intervenors seek recovery under RCW 21.20.430(1) which provides that:

> *Any person, who offers or sells a security in violation of any provisions of RCW 21.20.010* or 21.20.140 through 21.20.230, *is liable to the person buying the security from him or her,* who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longer owns the security. Damages are the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition.

(Italics ours.) Plaintiffs and intervenors allege that respondents violated RCW 21.20.010(2) and (3) by making material misrepresentations, or omitting necessary facts to make statements not misleading, in the Official Statements and Annual Reports.

Plaintiffs and intervenors contend that the trial court erred in concluding that RCW 21.20.430(1) imposes liability only on the literal seller of a security who passes title directly to the plaintiff. Instead, plaintiffs and intervenors argue that RCW 21.20.430(1), like its federal counterpart from which it was derived, section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2), imposes liability on those persons who are a substantial factor in a sale of securities.

[5] Washington's securities fraud laws are modeled after the Uniform Securities Act. RCW 21.20.430 parallels section 410 of the Uniform Securities Act, which in turn is modeled after section 12(2) of the federal Securities Act of 1933. *See* Comment, Uniform Securities Act § 410, 7B U.L.A. 644 (1985); L. Loss, *Commentary on the Uniform Securities Act* 147–48 (1976). Our Legislature provided that the WSSA

> shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation.

RCW 21.20.900. We have interpreted this provision to require harmony but not exact parallelism with other states' and federal law. *Kittilson v. Ford*, 93 Wn.2d 223, 227, 608 P.2d 264 (1980); *see Clausing v. DeHart*, 83 Wn.2d 70, 72–73, 515 P.2d 982 (1973) (applying federal analysis of Securities Exchange Act of 1934 to RCW 21.20.010). We note that while the purpose of federal securities laws is to maintain the integrity of the secondary securities markets and to enforce disclosure, the WSSA is intended to protect investors. Comment, *Securities Fraud Under the Blue Sky of Washington*, 53 Wash. L. Rev. 279, 282 n.10 (1978); Rooks, *The Blue Sky of Washington: Registration of Securities of a New Venture*, 6 Gonz. L. Rev. 187, 188 (1971).

To this end, this court has construed the WSSA broadly. *See McClellan v. Sundholm*, 89 Wn.2d 527, 533, 574 P.2d 371 (1978).

At least two Washington Court of Appeals decisions have interpreted the WSSA to impose liability upon persons rendering assistance in preparation of an unlawful sale of securities in violation of RCW 21.20.010. *See Golberg v. Sanglier*, 27 Wn. App. 179, 193, 616 P.2d 1239 (1980) (relying on *Kaas v. Privette*, 12 Wn. App. 142, 151, 529 P.2d 23 (1974)), *rev'd on other grounds*, 96 Wn.2d 874, 639 P.2d 1347, 647 P.2d 489 (1981). However, both decisions apparently presumed that liability attached pursuant to RCW 21.20.010 without determining civil liability under RCW 21.20.430(1).

In *McClellan v. Sundholm*, *supra* at 534, the court held a salesman liable under RCW 21.20.430(1) as a seller although the purchase agreement was between the buyer and the salesman's employer. Without discussing the absence of privity, the court found that because the salesman's actions constituted an "offer" of a security, his disposition of the security through the purchase agreement constituted a sale. *McClellan*, at 534.

Thus, although we have interpreted the offer and sell language in RCW 21.20.430(1) to be broad enough to include face to face "dispositions" of securities where privity is absent, we have not yet decided the scope of liability where privity is lacking.

An examination of federal court decisions interpreting section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) shows that only two circuits require privity between a plaintiff-purchaser and defendant-seller. *See, e.g., Collins v. Signetics Corp.*, 605 F.2d 110, 113–14 (3d Cir. 1979); *Sanders v. John Nuveen & Co.*, 619 F.2d 1222, 1226 (7th Cir. 1980), *cert. denied*, 450 U.S. 1005 (1981). This approach emphasizes the statutory language of section 12(2) in light of the Supreme Court's strict construction in securities cases not involving section 12(2). *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 578, 61 L. Ed.

2d 82, 99 S. Ct. 2479 (1979) (generalized references to the remedial purposes of The Securities Exchange Act of 1934 do not justify reading a provision more broadly than its language and the statutory scheme reasonably permit). In *Collins*, for example, the court concluded that a broad interpretation of section 12(2) would be contrary to its plain meaning and frustrate the overall statutory scheme where Congress had already provided a specific remedy for the purchaser against the defendant issuer of the securities in section 11 of the Securities Act of 1933. *Collins*, at 113.

The majority of the federal circuits, however, have construed the term seller to include those whose participation in the sale was a substantial factor in causing the transaction to take place. *See, e.g., Lawler v. Gilliam*, 569 F.2d 1283, 1287 (4th Cir. 1978); *Pharo v. Smith*, 621 F.2d 656, 665–67 (5th Cir. 1980), *rev'd in part on other grounds on rehearing*, 625 F.2d 1226 (5th Cir. 1980); *Davis v. AVCO Fin. Servs.*, 739 F.2d 1057, 1063–63 (6th Cir. 1984), *cert. denied*, 470 U.S. 1005, 472 U.S. 1012 (1985); *Stokes v. Lokken*, 644 F.2d 779, 785 (8th Cir. 1981); *Anderson v. Aurotek*, 774 F.2d 927, 930 (9th Cir. 1985); *SEC v. Murphy*, 626 F.2d 633, 650 (9th Cir. 1980); *Foster v. Jesup & Lamont Sec. Co.*, 759 F.2d 838, 843–44 (11th Cir. 1985), *aff'd*, 782 F.2d 901 (11th Cir. 1986); *see also In re Wicat Sec. Litig.*, 600 F. Supp. 1236, 1239, 1242 (D. Utah 1984) (although question of whether strict privity required not yet decided by Tenth Circuit, heavy weight of authority suggests substantial factor approach); *Cady v. Murphy*, 113 F.2d 988, 990 (1st Cir.), *cert. denied*, 311 U.S. 785 (1940) (broker who acted as agent for seller could be liable under section 12(2)).

The Supreme Court has not yet addressed this issue, but has most recently emphasized the cumulative remedial purpose of the securities laws is not to be ignored in their interpretation. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 386–87, 74 L. Ed. 2d 548, 103 S. Ct. 683 (1983); *see also Davis*, 739 F.2d at 1064 (Supreme Court has called for flexible yet literal interpretation of the securities acts).

This substantial factor–proximate cause approach originated in *Lennerth v. Mendenhall*, 234 F. Supp. 59, 65 (N.D. Ohio 1964), where the court stated:

> [L]iability must lie somewhere between the narrow view, which holds only the parties to the sale, and the too-liberal view which would hold all who remotely participated in the events leading up to the transaction. We think that the line of demarcation must be drawn in terms of cause and effect: To borrow a phrase from the law of negligence, did the injury to the plaintiff flow directly and proximately from the actions of this particular defendant? If the answer is in the affirmative, we would hold him liable. But for the presence of the defendant . . . in the negotiations preceding the sale, could the sale have been consummated? If the answer is in the negative, and we find that the transaction could never have materialized without the efforts of that defendant, we must find him guilty.
>
> . . . The hunter who seduces the prey and leads it to the trap he has set is no less guilty than the hunter whose hand springs the snare. We find that the activity of the corporate defendant's agent . . . is tantamount to that of a "seller" within the liberal remedial spirit of the securities laws.

The *Lennerth* court's proximate cause theory has been refined to the present substantial factor–proximate cause in subsequent cases. *Davis*, at 1066–67.

The *Davis* court concluded that a substantial factor test "constitutes an appropriate synthesis of the sometimes antithetical policies that the securities laws are to be construed as statutes while, at the same time, giving effect to their far-reaching remedial purpose." *Davis*, at 1067. Indeed, as noted by one commentator, a strict privity requirement applied to a firm commitment underwriting agreement, where underwriters buy the securities from the corporation without recourse if they cannot sell the entire block of shares, would allow a cause of action only against the underwriter, even where the corporation was the issuer raising capital through the sale. Note, *Seller Liability Under Section 12(2) of the Securities Act of 1933: A Prox-*

imate Cause Substantial Factor Approach Limited by a Duty of Inquiry, 36 Vand. L. Rev. 361, 389–90 (1983). Such a result could not have been intended by Congress and should not be allowed to defeat the remedial purposes of the securities laws. Note, 36 Vand. L. Rev., at 389–90.

A review of other states' decisions as to the scope of "seller" under their securities laws is inconclusive. The Oklahoma Supreme Court refused to construe language in its statute similar to that in RCW 21.20.430(1) to include participants in the securities transaction. *Nikkel v. Stifel, Nicolaus & Co.*, 542 P.2d 1305, 1307 (Okla. 1975). On the other hand, the Minnesota Court of Appeals has adopted a substantial factor test to determine seller liability under its securities act based on section 410 of the Uniform Securities Act and section 12(2). *Anders v. Dakota Land & Dev. Co.*, 380 N.W.2d 862 (Minn. Ct. App. 1986). This court's research disclosed no other state court decisions construing state securities laws similar to RCW 21.20.430(1).

Although other federal courts have construed similar state securities statutes, the decisions do not reflect state court analysis. They instead reflect a federal analysis of section 12(2) as applied to the state law in question. Moreover, the analysis applied by federal trial courts in these cases is usually that of their respective federal circuits. *See, e.g., Dahl v. Pinter*, 787 F.2d 985, 991 (5th Cir. 1986) (Texas test for seller liability substantially similar to Fifth Circuit substantial factor test), *cert. granted*, ___ U.S. ___, 95 L. Ed. 2d 493, 107 S. Ct. 1885 (1987); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 550–51 (5th Cir. 1981) (interpreting Texas Securities Act to impose liability on persons constituting a substantial factor in sale, noting that Texas statutory comments referred to section 12(2) as model for state act and noting that the Fifth Circuit uses substantial factor test), *rev'd on other grounds*, 459 U.S. 375 (1983); *see also Anderson v. Aurotek*, 774 F.2d at 929 n.1 (assuming that Washington securities statute interpreted in same manner as section 12(2), finding substantial factor liability); *SEC v. Seaboard Corp.*, 677 F.2d 1289,

1295 (9th Cir. 1982) (California requires direct privity, no California precedent); *In re Victor Technologies Sec. Litig.*, Blue Sky L. Rep. (CCH) ¶ 72,491 (N.D. Cal. 1987) (relying on *In re Diasonics Sec. Litig.*, 599 F. Supp. 447, 459 (N.D. Cal. 1984) (finding that California Securities Act requires privity)); *In re Catanella & E.F. Hutton & Co. Sec. Litig.*, 583 F. Supp. 1388, 1440 (E.D. Pa. 1984) (Pennsylvania securities statute privity requirement likened to that found in section 12(2)); *Ging v. Parker–Hunter, Inc.*, 544 F. Supp. 49, 52 (W.D. Pa. 1982) (determining that Pennsylvania Securities Act requires strict privity, no Pennsylvania precedent). In any event, federal law does not preempt or control state securities acts. *See* Securities Act of 1933, § 18, 15 U.S.C. § 77r.

[6] We conclude that the substantial factor–proximate cause definition of seller prevailing in the federal circuits provides the best guidance for our analysis of seller liability under RCW 21.20.430(1). We note that our conclusion is in accord with the views expressed in the official comments to the recently revised Uniform Securities Act of 1985. Although not adopted in Washington, new section 605(a) of the Uniform Securities Act contains the language of old section 410 upon which RCW 21.20.430(1) was based. The official comments to section 605(a) state that under this section, "liability may be imposed on a person in addition to the immediate seller if the person's participation was a substantial contributive factor in the violation." Uniform Securities Act, § 605 comment, 7B U.L.A. 81 (Supp. 1987) (citing *Davis*, 739 F.2d at 1057). We believe this approach best promotes the legislative purpose behind the WSSA, while harmonizing our statutory scheme with federal and other state decisions. We also believe this definition is in harmony with similar developments in general tort law. *Davis*, at 1066.

The Ninth Circuit has described its substantial factor–proximate cause analysis as follows:

> In assessing proximate cause, courts focus first on whether a defendant's acts were the *actual cause* of the

> injury, *i.e.*, whether 'but for' the defendant's conduct, there would have been no sale. *Nicewarner v. Bleavins, supra*, 244 F. Supp. [261] at 266 (D.Colo.1965); *see Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d [680, 693 (5th Cir. 1971)]; *Lennerth v. Mendenhall, supra*, 234 F.Supp. at 65. A finding of "but for" causation, alone, does not satisfy proximate cause, however. *See Nicewarner v. Bleavins, supra*, 244 F.Supp. at 266; R. Jennings & H. Marsh, Securities Regulation 1096 (4th ed. 1977); W. Prosser, Handbook of the law of Torts 238–39, 244 (4th ed. 1971). Prior to the issuance of a security, numerous persons perform mechanical acts without which there could be no sale. For example, a printer may prepare key documents or a bank may advance cash to a customer upon the customer's presentation of an instrument and then pass the instrument to another person. Both would satisfy a "but for" causation test, but these acts nonetheless do not render the defendants sellers. *See First Trust & Savings Bank v. Fidelity–Philadelphia Trust Co.*, 214 F.2d 320 (3d Cir. 1954); Ruder, Multiple Defendants in Securities Law Fraud Cases, 120 U.Pa.L.Rev. 597, 646 (1972). Before a person's acts can be considered the proximate cause of a sale, his acts must also be a substantial factor in bringing about the transaction. *Lewis v. Walston & Co., Inc.*, 487 F.2d 617, 621–22 (5th Cir. 1973). *See* Restatement (Second) of Torts § 431 (1965).

SEC v. Murphy, 626 F.2d 633, 650 (9th Cir. 1980).

In a similar fashion, we hold that a defendant is liable as a seller under RCW 21.20.430(1) if his acts were a substantial contributive factor in the sales transaction. Considerations important in determining whether a defendant's conduct is a substantial contributive factor in the sales transaction include: (1) the number of other factors which contribute to the sale and the extent of the effect which they have in producing it; (2) whether the defendant's conduct has created a force or series of forces which are in continuous and active operation up to the time of the sale, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and (3) lapse of time. *See generally* Restatement (Second) of Torts

§§ 432, 433 (1977). Whether a defendant's conduct was a substantial contributive factor is necessarily a question of fact.

We emphasize that our adoption of a substantial contributive factor test to determine seller liability under RCW 21.20.430(1) is distinct from the test for participant liability pursuant to RCW 21.20.430(3). Our substantial contributive factor analysis simply expands the strict privity approach to sellers so as to include those parties who have the attributes of a seller and thus who policy dictates should be subject to liability under RCW 21.20.430(1), but who would escape primary liability for want of privity.

Here, for example, the Supply System sold all the bonds to underwriters who then sold them to plaintiffs and intervenors. If we were to require strict privity for liability under RCW 21.20.430(1), only the underwriters would be potentially liable for prospectus fraud, cutting off all potential claims against the issuer of the bonds and others acting together with the issuer who were the actual beneficiaries of the sale proceeds. The result allows issuers of securities to insulate themselves from liability to ultimate purchasers simply by selling to middlemen beyond their control, even in situations where they know that the securities will be resold immediately to buyers who will rely on Official Statements and Annual Reports written by the issuer to facilitate the sales. Unlike the federal Securities Act of 1933, § 11, the WSSA does not provide for separate issuer liability. Thus, if privity were required for liability under RCW 21.20.430(1), an issuer in a firm commitment underwriting would never be liable, regardless of its culpability. We find such a result contrary to the clear purposes of the WSSA.

RCW 21.20.430(1) liability remains based on a defendant's status as seller. RCW 21.20.430(3) liability is based on other defendants' relationships to a seller liable under RCW 21.20.430(1). Therefore, respondents' argument that a substantial contributive factor approach to seller in RCW 21.20.430(1) would render RCW 21.20.430(3) meaningless is

without merit. Although some secondarily liable parties under RCW 21.20.430(3) may also be liable as sellers under RCW 21.20.430(1), clearly not all secondarily liable parties are sellers under the substantial contributive factor test. Thus, as contemplated by the statutory scheme, participants who are involved in a securities sale, but who are not substantial contributive factors, may be subject to secondary liability under RCW 21.20.430(3).

We therefore reverse the trial court's dismissal of plaintiffs' and intervenors' securities claims under RCW 21.20-.430(1).

B

Secondary Liability Claims Under RCW 21.20.430(3)

Our conclusion that seller liability pursuant to RCW 21.20.430(1) is to be determined through a substantial contributive factor analysis necessarily requires us to reverse the trial court's dismissal of plaintiffs' and intervenors' secondary liability claims pursuant to RCW 21.20.430(3). Because secondary liability under RCW 21.20.430(3) would be based on a party's relationship to a seller of securities, the sufficiency of plaintiffs' and intervenors' allegations of secondary liability can only be determined after the sellers are identified. We also reverse the trial court's determination that respondent nonmember Participants are not secondarily liable because they did not control the Supply System. For purposes of our CR 12(b)(6) standard of review, it is conceivable that nonmember Participants may be secondarily liable because of their relationship to a party other than the Supply System. We cannot say, without a determination of all sellers potentially liable under RCW 21.20.430(1), that these respondents did not control any seller.

C

Implied Remedy Under RCW 21.20.010

In the alternative, intervenors argue that RCW 21.20.010 provides an implied remedy to fill any liability gap created by a strict privity requirement under RCW 21.20.430(1).

Because we find that RCW 21.20.430(1) provides an express remedy available to intervenors, we need not address the issue.

D

Extraterritorial Application of the WSSA

Respondent Small Utilities Group contends that the trial court's dismissal of plaintiffs' and intervenors' WSSA claims should be upheld because the WSSA should not be applied extraterritorially to out–of–state defendants or transactions. Small Utilities Group also contends that extraterritorial application of the WSSA would violate the commerce clause. We disagree with both contentions.

[7] Initially, we note that this issue involves the choice of law to be applied in this case rather than whether the WSSA can be applied extraterritorially to regulate out–of–state transactions. Here, we are not concerned with the application of the WSSA within another state's jurisdiction. Instead, the question before us is whether the WSSA applies in an action brought in a Washington forum where out–of–state parties are under this State's jurisdiction. As a result, choice of law principles govern our analysis.

This court employs a "most significant relationship" standard to determine what law governs in a contracts or torts case. *Southwell v. Widing Transp., Inc.*, 101 Wn.2d 200, 204, 676 P.2d 477 (1984); *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976). This standard requires a court to evaluate the contacts of the interested jurisdictions with respect to the claims at issue and the interests and policies of those jurisdictions. *Southwell*, at 204.

Here, Washington is clearly the state with the most substantial contacts with the subject matter of this case. The bonds at issue were issued by the Supply System to finance two nuclear power plants in Washington. The Supply System, respondent members and directors, one respondent bond counsel, as well as the majority of the respondent Participants are Washington residents. All respondents had

substantial business dealings in Washington, and the Official Statements and Annual Reports allegedly containing misrepresentations emanated from this state. No party contends that another state's securities act applies. Moreover, Washington State has an interest in regulating the conduct of parties involved in the sale of bonds issued by a municipal corporation, the Supply System, to finance construction of in-state power generating facilities. We conclude that the contacts of the parties involved, the claims at issue, and the interests of this State dictate our application of the WSSA to this case.

Nevertheless, Small Utilities Group contends that our application of the WSSA would violate the commerce clause. Their argument is based on *Edgar v. MITE Corp.*, 457 U.S. 624, 641, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982). *Edgar* involved a commerce clause challenge to an Illinois statute regulating corporate takeovers in a multistate context. The statute could be applied to regulate tender offers not affecting Illinois shareholders. *Edgar*, at 642. The Court found that the burden on interstate commerce posed by the statute was not counterbalanced by local interests, and that the statute upset the balance struck by Congress between corporate management and takeover bidders in its regulation of interstate tender offers. *Edgar*, at 643–46. The Court noted that an impermissible conflict between federal and state regulation of commerce exists where compliance with both federal and state regulations is physically impossible, or where state law interferes with the accomplishment and execution of congressional purposes and objectives. *Edgar*, at 631.

[8] Here, our application of the WSSA does not impinge on federal regulation of commerce as did the Illinois anti-takeover statute under scrutiny in *Edgar*. First, our application of the WSSA to this case is based on the substantial relationship between the subject matter, the parties, and the forum state. Unlike the Illinois statute in *Edgar*, we do not attempt to apply the WSSA to transactions completely unrelated to Washington. Moreover, in contrast to the cor-

porate takeover regulations at issue in *Edgar*, Congress explicitly provided that federal and state securities regulation may co–exist absent conflict. *See* 15 U.S.C. §§ 77r, 78bb(a) (1981). The WSSA is intended to be coordinated with related federal regulation. RCW 21.20.900. Our application of the WSSA in this case in no way affects the federal regulatory scheme enacted by Congress to regulate interstate securities transactions. Finally the impact of our application of the WSSA on interstate commerce does not rise to the level of an impermissible burden like that found in *Edgar*.

> Not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Edgar, at 640, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970).

Washington's interests in regulating bond issues by municipal corporations, and in providing a forum for claims arising from those issues outweigh the impact that our application of the WSSA in this case will have on interstate commerce, particularly when considering the substantial relationship between this state and the case in controversy. *See In re WPPSS Sec. Litig.*, [new matters] Blue Sky L. Rep. (CCH) ¶ 72,371, 71,683 (W.D. Wash. 1986); Lewis v. Berry, No. C82–1244VR (W.D. Wash. May 24, 1985) (WSSA antifraud provision does not burden interstate commerce; it is clearly justified by the local interests served). Thus, we find no violation of the commerce clause. The WSSA may be properly applied to this case.

E

Scienter Amendment Claims

The trial court held that RCW 21.20.430(7) applied retroactively to bar plaintiffs' and intervenors' WSSA claims. Plaintiffs and intervenors, together with respon-

dent/cross-appellant Wood & Dawson, challenge RCW 21.20.430(7) on several constitutional grounds.

As amended in 1985, RCW 21.20.430(7) provides that:

> Notwithstanding subsections (1) through (6) of this section, if an initial offer or sale of securities that are exempt from registration under RCW 21.20.310 *is made by this state or its agencies*, political subdivisions, municipal or quasi-municipal corporations, or other instrumentality of one or more of the foregoing and is in violation of RCW 21.20.010(2), and any such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such issuer acting on its behalf, or person in control of such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such person acting on its behalf, materially aids in the offer or sale, such person is liable to the purchaser of the security *only if the purchaser establishes scienter on the part of the defendant*. The word "employee" or the word "agent," as such words are used in this subsection, do not include a bond counsel or an underwriter. *Under no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters.*

(Italics ours.) RCW 21.20.430(7) (Laws of 1985, ch. 171, § 1). The Legislature again amended RCW 21.20.430(7) in 1986, adding that:

> The provisions of this subsection *are retroactive* and apply to any action commenced but not final before July 27, 1985. In addition, the provisions of this subsection apply to any action commenced on or after July 27, 1985.

(Italics ours.) RCW 21.20.430(7) (Laws of 1986, ch. 304, § 1).

1. *Equal Protection*

Initially, plaintiffs and intervenors argue that RCW 21.20.430(7) violates their state and federal equal protection guaranties by treating similarly situated persons unequally. They contend that RCW 21.20.430(7) impermissibly distinguishes between public and private defendants, and in-state and out-of-state public issuers.

Within the context of their equal protection claims, intervenors also contend that RCW 21.20.430(7) violates the federal commerce clause because it discriminates between in–state and out–of–state public issuers. However, intervenors' argument mischaracterizes the nature of the commerce clause. While the commerce clause is designed to prevent states from burdening the free flow of interstate commerce, *Massachusetts v. United States*, 435 U.S. 444, 462, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978), the equal protection clause protects persons from unconstitutional discrimination by the states, *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881, 84 L. Ed. 2d 751, 105 S. Ct. 1676, *reh'g denied*, 471 U.S. 1120 (1985). Here, intervenors' commerce clause claims are better characterized as part of their equal protection claims; we will consider them as such.

Respondents argue that because plaintiffs' and intervenors' equal protection rights are not affected by the statute's distinction between public and private issuers, and between in–state and out–of–state public issuers, they lack standing to assert these claims. We agree.

The doctrine of standing prohibits a litigant from raising another's legal rights. *Allen v. Wright*, 468 U.S. 737, 750–51, 82 L. Ed. 2d 556, 104 S. Ct. 3315, *reh'g denied*, 468 U.S. 1250 (1984). One who is not adversely affected by a statute may not question its validity. *State v. Carroll*, 81 Wn.2d 95, 103–04, 500 P.2d 115 (1972); *State v. Sluder*, 11 Wn. App. 8, 10, 521 P.2d 971, *review denied*, 84 Wn.2d 1008 (1974). Here, no plaintiff or intervenor is a public or private defendant for RCW 21.20.430(7) purposes, and no out–of–state issuer of securities is party to this suit. Plaintiffs and intervenors improperly attempt to assert the equal protection rights of other parties and nonparties. We conclude that plaintiffs' and intervenors' state and federal equal protection claims fail for lack of standing.

Notwithstanding plaintiffs' and intervenors' lack of standing, respondent/cross–appellant Wood & Dawson argues that RCW 21.20.430(7) violates its equal protection rights by distinguishing between a public issuer's bond

counsel, against whom a plaintiff need only establish negligence, and other employees and agents of that issuer, against whom scienter must be proved. Wood & Dawson, as bond counsel to the Supply System, a public issuer within the meaning of RCW 21.20.430(7), does have standing to assert its equal protection claims.

[9] A party challenging a legislative classification has the heavy burden of overcoming the presumption of a statute's constitutionality. *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs*, 92 Wn.2d 831, 835, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979, 64 L. Ed. 2d 835, 100 S. Ct. 2958 (1980). A statute should not be declared unconstitutional unless it appears unconstitutional beyond a reasonable doubt. *State v. Maciolek*, 101 Wn.2d 259, 263, 676 P.2d 996 (1984).

[10] At the threshold of any equal protection determination, the court must identify the appropriate standard of judicial review. *Convention Ctr. Coalition v. Seattle*, 107 Wn.2d 370, 378, 730 P.2d 636 (1986). Here, because RCW 21.20.430(7) does not involve a suspect classification or fundamental right, we apply a rational basis test. *See Convention Ctr. Coalition*, at 378.

Under a rational basis test the court must determine: (1) whether the legislation applies alike to all members within a designated class; (2) whether there are reasonable grounds to distinguish between those within and those without the class; and (3) whether the classification has a rational relationship to the purpose of the legislation. *Convention Ctr. Coalition*, at 378–79.

[11] Wood & Dawson first contends that RCW 21.20-.430(7) treats members of the same class differently. Wood & Dawson claims that some "agents" are subject to a scienter standard while other "agents"—bond counsel—are subject only to negligence. We disagree. RCW 21.20.430(7) clearly exempts bond counsel from its definition of agent or employee. As a result, the statute creates a distinction between two classes, agents and bond counsel, not between members of the same class.

Wood & Dawson next argues that no rational basis exists for the RCW 21.20.430(7) distinction between bond counsel and agents. Again we disagree. Under the rational basis test, a statutory classification will be upheld if any state of facts may reasonably be conceived to substantiate it. *Automobile Drivers & Demonstrators, Local 882 v. Department of Retirement Sys.*, 92 Wn.2d 415, 422, 598 P.2d 379 (1979), *appeal dismissed, cert. denied*, 444 U.S. 1040 (1980); *see also Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528, 3 L. Ed. 2d 480, 79 S. Ct. 437 (1959). Such a rational basis for a legislative decision need not have actually motivated the Legislature's decision. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980), *reh'g denied*, 450 U.S. 960 (1981).

> States are not required to convince the courts of the correctness of their legislative judgments . . .
>
> [P]arties challenging legislation under the Equal Protection Clause . . . cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable."

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464, 66 L. Ed. 2d 659, 101 S. Ct. 715, *reh'g denied*, 450 U.S. 1027 (1981) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154, 82 L. Ed. 1234, 58 S. Ct. 778 (1938)).

Here, we find several reasonable grounds upon which the Legislature could have based its decision to distinguish agents of public issuers from bond counsel. First, the Legislature could have reasonably concluded that bond counsel should be held to a higher standard of care because of their expertise upon which the public at large has a right to rely. Also, the Legislature may have concluded that because bond counsel, like underwriters, are among the last "links in the chain" in the sale of bonds to the public, they are in a better position to protect the public from misrepresentations or omissions in the sale of securities. Thus, the Legislature may have retained a negligence standard to

encourage greater diligence on the part of bond counsel prior to distribution of bonds to the public. Furthermore, bond counsel typically provides the principal opinion letter upon which the underwriters, investors and issuers rely to determine the validity of an offering. *See* Comment, *The Function and Professional Responsibilities of Bond Counsel*, 16 Urb. Law. 489, 490–91 (1984). Bond counsel therefore perform different functions than other agents or employees of public issuers. Finally, the Legislature may have reasonably distinguished between bond counsel and public issuer agents and employees on the basis of compensation. Here, for example, plaintiffs allege that respondent bond counsels' compensation was based on a percentage of the dollar value of the bonds sold. See Plaintiffs' third amended complaint, at 48; Clerk's Papers, at 1044. Bond counsel may have a greater incentive to "sell" the bonds than do agents or employees of public issuers who are compensated by contract. The Legislature could have determined that bond counsel are thus more profit oriented and less public interest oriented than other agents of a public issuer. We conclude that reasonable grounds exist to support the Legislature's distinction between bond counsel and other agents or employees of public issuers of securities.

With these grounds on which the Legislature could have based its classifications in mind, we also conclude that the classifications are rationally related to the remedial purposes of the WSSA. Presuming that the Legislature had reason to distinguish between bond counsel and other agents of public issuers on the basis of their abilities to protect the public, the Legislature's decision to hold bond counsel to a negligence standard must prevail.

Therefore, because there exists a reasonable basis for the Legislature's distinction between bond counsel and other agents of public issuers and because this basis is rationally related to the overall purpose of the WSSA, we conclude that RCW 21.20.430(7) does not violate Wood & Dawson's state or federal equal protection rights.

2. *Special Legislation*

[12] We also find that RCW 21.20.430(7) is not special legislation prohibited by Const. art. 2, § 28(17). It is a general law applicable to all public issuers of securities that are exempt from registration under RCW 21.20.310. *See Libby, McNeill & Libby v. Ivarson,* 19 Wn.2d 723, 730, 144 P.2d 258 (1943) (special laws relate to particular persons or things, while general laws operate on all persons or things constituting a class); *Swanson v. School Dist. 15,* 109 Wash. 652, 654, 657, 187 P. 386 (1920) (statute relieving school districts and their officers, agents or employees from liability for injuries arising out of manual training equipment not special legislation because the act applied to all school districts in state). Moreover, a party challenging a statute as special legislation must show that the classification made by a statute, as well as the statute itself, is not rationally related to the purpose of the statute. *See Seattle v. State,* 103 Wn.2d 663, 675, 694 P.2d 641 (1985). Here, as our equal protection analysis demonstrates, the Legislature's classification in RCW 21.20.430(7) is a rational one, related to the overall purposes of the WSSA. Plaintiffs and intervenors fail to overcome the presumption of constitutionality as required. We conclude that RCW 21.20.430(7) is not special legislation prohibited by Const. art. 2, § 28(17).

3. *Due Process*

Next, Intervenors argue that retroactive application of RCW 21.20.430(7) violates their state and federal due process rights. We find this argument without merit.

[13] A claimant alleging deprivation of due process must first establish a legitimate claim of entitlement. *Meyer v. UW,* 105 Wn.2d 847, 853, 719 P.2d 98 (1986). Legitimate claims of entitlement entail vested liberty or property rights. *In re Marriage of MacDonald,* 104 Wn.2d 745, 748, 709 P.2d 1196 (1985). A claimant has no vested right in the continuation of existing statutory law. *MacDonald,* at 750. This court has held that statutory tort claim rights under Washington law are not vested absent a

final, unreviewable judgment. *Seattle Rendering Works, Inc. v. Darling-Delaware Co.*, 104 Wn.2d 15, 19, 701 P.2d 502 (1985); *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 563, 663 P.2d 482 (1983); *Haddenham v. State*, 87 Wn.2d 145, 149–50, 550 P.2d 9 (1976); *Sparkman & McLean Co. v. Govan Inv. Trust*, 78 Wn.2d 584, 587, 478 P.2d 232 (1970). Moreover, property interests for federal due process purposes are not created by the United States Constitution, but instead stem from independent sources such as state law. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985).

Here, because intervenors have no claim of entitlement to the pre–amendment terms of RCW 21.20.430(7), we conclude that retroactive application of the section does not implicate any interest protected by state or federal due process guaranties.

4. *Separation of Powers*

Intervenors also unclearly allege separation of powers arguments as part of their due process claims. We find these arguments unpersuasive.

[14] A statute prescribing new rules to be applied to pending litigation is generally constitutional because it does not violate the separation of powers clause. 16 C.J.S. *Constitutional Law* § 127 (1984). Separation of powers principles are violated only when the Legislature infringes on a judicial function. *See United States v. Board of Educ.*, 588 F. Supp. 132, 134 (N.D. Ill. 1984); *In re Consol. United States Atmospheric Testing Litig.*, 616 F. Supp. 759, 770–71 (N.D. Cal. 1985); *United States v. Brainer* 691 F.2d 691, 695 (4th Cir. 1982); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 402–05, 65 L. Ed. 2d 844, 100 S. Ct. 2716 (1980).

Intervenors rely on *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146–47, 20 L. Ed. 519 (1871), condemning congressional attempts to alter the rule of decision in pending litigation. However, we note that courts have restricted *Klein* since it was decided over 100 years ago:

> [T]he better reading of *Klein* is quite narrow and construes the case as holding only that Congress violates the separation of powers when it presumes to dictate "how the Court should decide an issue of fact (under threat of loss of jurisdiction)" and purports "to bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds."

Brainer, at 695 (quoting P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, *The Federal Courts and the Federal System* 316 n.4 (2d ed. 1973)); *In re Consol. United States Atmospheric Testing Litig.*, 820 F.2d 982, 992 (9th Cir. 1987). We find *Klein* distinguishable from the present case.

Here, the Legislature's retroactive amendment of RCW 21.20.430 does not impede upon the court's right and duty to apply new law to the facts of this case. It does not dictate how the court should decide a factual issue, nor does it affect a final judgment. Instead, the amendment is a legislative enactment of a facially neutral law for the court to apply to the facts before it. We find no violation of separation of powers principles.[1] *See In re Consol. United States Atmospheric Testing Litig., supra*, at 992 (no violation of separation of powers where act neither directs the court to make a certain finding of fact, nor requires it to apply an unconstitutional law).

5. *Impairment of Contracts*

Finally, plaintiffs argue that retroactive application of the RCW 21.20.430(7) scienter standard impairs their contractual right to recover for negligence under their bond contracts. They contend that because negligence was the standard of liability before the RCW 21.20.430(7) amendment, that standard was incorporated into their bond contracts and cannot now be changed by the Legislature. We disagree.

[15] The Washington and federal provisions forbidding impairment of contract are given similar effect. *Ruano v.*

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[1]Our analysis leads us to a contrary result to that reached by the federal district court in In re Washington Public Power Supply System Securities Litigation (W.D. Wash. Apr. 30, 1987) (MDL 551) (Order).

Spellman, 81 Wn.2d 820, 825, 505 P.2d 447 (1973). Both clauses forbid laws that impair the "obligation of contracts". *See* U.S. Const. art. 1, § 10; Const. art. 1, § 23. The contracts clause is applicable only if the legislative act complained of impairs a contractual relationship. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244–45, 57 L. Ed. 2d 727, 98 S. Ct. 2716, *reh'g denied*, 439 U.S. 886 (1978). The impaired relationship must be a "contract" in the usual sense of the word "signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts." *Crane v. Hahlo*, 258 U.S. 142, 146, 66 L. Ed. 514, 42 S. Ct. 214 (1922). A contract clause claim based on statutory rights succeeds only if "the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.14, 52 L. Ed. 2d 92, 97 S. Ct 1505, *reh'g denied*, 431 U.S. 975 (1977). The contracts clause does not prohibit the states from repealing or amending statutes generally, or from enacting legislation with retroactive effects. *United States Trust Co.*, at 17.

Here, plaintiffs argue that the negligence standard existing prior to the RCW 21.20.430(7) amendment became a part of their bond contracts because their bond purchases pursuant to the contracts were made in contemplation of existing law.

Initially, we note that in situations where statutes govern the interpretation and enforcement of private agreements, such statutes may create contractual rights because the statutes define the parties' contractual rights. *United States Trust Co.*, at 17 n.14; *Tremper v. Northwestern Mut. Life Ins. Co.*, 11 Wn.2d 461, 463–64, 119 P.2d 707 (1941) (statutory change in rule for interpreting the interest term on life insurance policy loans would have changed the meaning of an agreed term in a life insurance contract). However, where a general statute involved provides a remedy, which is later changed, the previous remedy will not ordinarily be implied as an unexpressed term of an other-

wise express contract. *See Chicago & A. R.R. v. Tranbarger*, 238 U.S. 67, 76, 59 L. Ed. 1204, 35 S. Ct. 678 (1915).

Here, the negligence standard existing prior to the RCW 21.20.430(7) amendment was part of a statutory remedy. It was not expressly incorporated as a term of the bond contract. Moreover, the negligence standard did not define any party's rights pursuant to the bond contract. Thus, the RCW 21.20.430(7) amendment requiring scienter in place of negligence did not affect, much less impair, the terms of the contract.

Nevertheless, plaintiffs contend that the subsequent amendment to require scienter diminished the value of their bonds, thus unconstitutionally impairing the force of their contracts. Plaintiffs rely on *Metropolitan Seattle v. O'Brien*, 86 Wn.2d 339, 352, 544 P.2d 729 (1976), for the proposition that an action by the State "though indirect, which diminishes the value of the contract constitutes a prohibited impairment." We disagree with plaintiffs' broad reading of *O'Brien*. In *O'Brien*, the Legislature authorized certain taxes to provide security for a city's debt service obligations pursuant to the city's issuance of bonds. *O'Brien*, at 342. This security, which substantially exceeded the actual debt requirements, was found to be an important reason for favorable bond ratings and an important factor in the bondholders' decisions to purchase the bonds. *O'Brien*, at 351. It was within this context that the court held that a state official's withholding of the funds impaired the bondholders' contract because his actions diminished the value of the bonds by affecting the security underlying them. *O'Brien*, at 352.

Here, we do not believe that the negligence standard of liability in force at the time of the bond purchases was an important reason for favorable bond ratings or an important factor in the bondholders' decisions to purchase the bonds. Moreover, unlike the State's action in *O'Brien*, which directly affected a security pledged in the bond contract, here the Legislature's amendment of a general civil liability provision of the WSSA only changed the element

of a statutory remedy that was never a part of the bond contract. We conclude that the Legislature's amendment in RCW 21.20.430(7) did not unconstitutionally impair any of plaintiffs' contractual rights.

Finally, plaintiffs contend that because RCW 21.20-.430(7) by its express terms applied only to RCW 21.20-.010(2), their negligence claims under RCW 21.20.010(3) still survive. However, plaintiffs point to no trial court ruling on this issue. Therefore, we decline to address the issue as it is not properly before the court. Overall we conclude that the trial court properly applied RCW 21.20.430(7) to require plaintiffs and intervenors to show scienter on the part of respondents coming within its terms to establish their violation of RCW 21.20.010(2).

V

Derivative Professional Negligence and Malpractice Claims

Plaintiffs and intervenors seek reversal of the trial court's dismissal of their derivative negligence and malpractice claims against respondent professionals for services rendered to the Supply System.

In a derivative suit, a stockholder asserts rights or remedies belonging to the corporation for the corporation's benefit. 12B W. Fletcher, *Private Corporations* § 5907 (1984). Such suits arise in equity to enforce a corporate right which the corporation fails, is unable, or refuses to assert by court action. *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 777, 496 P.2d 343 (1972); *Goodwin v. Castleton*, 19 Wn.2d 748, 761–62, 144 P.2d 725 (1944). Derivative suits are disfavored and may be brought only in exceptional circumstances. *See LaHue*, at 777. Double derivative actions usually occur when a stockholder of a parent or holding company sues to enforce a cause of action in favor of a subsidiary company. 13 W. Fletcher, *Private Corporations* § 5977 (1984); H. Henn & J. Alexander, *Corporations* 1056 (3d ed. 1983). The ultimate beneficiary of a double derivative action is the corporation that possesses the primary right to sue. N. Lat-

tin, *Corporations* 367–68 (1959).

A

Standing

Here, plaintiffs and intervenors sue through Chemical Bank, asserting its right as bond trustee to sue on the Supply System's behalf for injury resulting from the professionals' negligence. The Supply System and the respondent professionals challenge plaintiffs' and intervenors' authority to bring derivative claims. In turn, plaintiffs and intervenors challenge the Supply System's and the professionals' standing to challenge their authority. They assert that only Chemical Bank, their trustee, has standing to contest their authority to sue derivatively. They note that Chemical Bank does not challenge their authority, and has filed no brief in this appeal. We find plaintiffs' and intervenors' standing arguments unpersuasive.

[16] Standing to challenge a derivative plaintiff's failure to comply with the procedural requirements of a derivative suit lies with the entity the plaintiff seeks to represent. *Colan v. Monumental Corp.*, 524 F. Supp. 1023, 1028 (N.D. Ill. 1981); *Prager v. Sylvestri*, 449 F. Supp. 425, 429 (S.D.N.Y. 1978); *see* Note, *Defenses in Shareholders' Derivative Suits—Who May Raise Them*, 66 Harv. L. Rev. 342, 343, 346 (1952) (proper party to invoke defense is party whom defense is designed to protect). Here, because plaintiffs' and intervenors' claims against the professionals are "double derivative" in nature, it follows that the entity they ultimately seek to represent is the Supply System, through Chemical Bank. See Brief of Appellant Haberman, at 69 (derivative claims here are by definition for benefit of Supply System). Therefore, the Supply System has standing to challenge these claims. Moreover, other courts have granted standing to defendants other than the corporation to assert derivative plaintiffs' lack of authority to sue for failure to comply with procedural requirements. *See, e.g., Shlensky v. Dorsey*, 574 F.2d 131, 142 (3d Cir. 1978) (accountant for corporation had standing to raise plaintiffs'

noncompliance with procedural requirements for derivative suit); *Dietzel v. Anger*, 8 Cal. 2d 373, 377–78, 65 P.2d 803 (1937) (defendant shareholders challenged derivative bondholder suit based on failure to meet indenture demand requirements). We conclude that respondents have standing to challenge plaintiffs' and intervenors' authority to bring these "double derivative" claims.

B

Equitable Stockholder Derivative Claims

[17] To begin with, we note that plaintiffs and intervenors blur the distinction between a stockholder's equitable right to sue derivatively and a bondholder's right, which is contractual in nature. Standing to bring a stockholder derivative claim requires a proprietary interest in the corporation whose right is asserted. *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 735–36 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). A creditor has no equitable standing to sue derivatively. *Dodge v. First Wis. Trust Co.*, 394 F. Supp. 1124, 1127 (E.D. Wis. 1975); *see* CR 23.1 (referring to *Stockholders'* rights to bring derivative suit). Thus, as bondholders, plaintiffs and intervenors are only creditors of the Supply System with no proprietary interest, they have no equitable right to bring derivative claims.

C

Bondholder Derivative Claims

Because there is no governing body of statutory or common law that protects bondholders against harmful acts by issuers except in the most extreme situations, bondholders' rights are created and protected by contracts between the bondholders and issuers. *See* American Bar Found., *Indentures* 2 (1971). These "Debenture Indentures" commonly designate a trustee to protect the bondholders' contractual rights created pursuant to the indenture. *Indentures*, at 2, 8. Although debts created by bonds issued run directly from the issuer to the bondholders, the contractual rights conferred by indentures run from the issuer to the trustee for the bondholders' benefit. *Indentures*, at 8, 233; *see also*

Note, *The Rights and Remedies of the Bondholder Under Corporate Bonds and Indentures: I*, 27 Colum. L. Rev. 443, 445 (1927).

Here, the WNP 4 and WNP 5 bonds were issued according to the authority granted the Supply System in resolution 890, an indenture agreement between the Supply System and the bondholders. Resolution 890 reflects provisions commonly contained in debenture indentures. Section 11.4 of resolution 890 authorizes the bond fund trustee, Chemical Bank, to sue on the bondholders' behalf in the event of default, and to sue on the Supply System's behalf in a derivative–type capacity upon request of a majority of the bondholders. Clerk's Papers, Second Supplemental Index, at 92, 96.

Section 11.5, a "no action" provision, precludes suit pursuant to a right created in resolution 890 unless 20 percent of the bondholders serve a formal demand upon the trustee, a reasonable time passes for the trustee to respond to the demand, and the would–be plaintiffs furnish security and indemnity to the trustee. Such "no action" provisions serve to ensure that a few bondholders take no advantage of corporate assets over other bondholders, to avoid burdensome multitudinous suits where one would suffice, and to ensure that the security of all the bondholders is not threatened by a minority action that a large majority believes hostile to its interests. *Quirke v. St. Louis–San Francisco Ry.*, 277 F.2d 705, 709–10 (8th Cir.), *cert. denied*, 363 U.S. 845 (1960); *Moore v. Tumwater Paper Mills*, 181 Wash. 45, 52–53, 42 P.2d 29, *cert. denied*, 296 U.S. 597 (1935); *Indentures*, at 232–33.

We note also that section 11.5 distinguishes between bondholder suits to enforce payment of the principal and interest on the bonds and bondholder suits pursuant to contractual rights created in resolution 890. See resolution 890, § 11.5, Clerk's Papers, Second Supplemental Index, at 96. While the "no action" provision of section 11.5 explicitly governs all rights of action pursuant to resolution 890, it does not impair or affect the Supply System's underlying

obligation for principal and interest to the bondholders, nor the bondholders' ability to enforce payment of their bonds. Resolution 890, § 11.5, Clerk's Papers, Second Supplemental Index, at 96.

Plaintiffs and intervenors contend that resolution 890's procedural restrictions do not bar their maintenance of these derivative claims because the limitations were inadequately incorporated in the bonds.

The WNP 4 and WNP 5 bonds provided that:

> [R]eference [to resolution 890] is hereby made for a more complete description of the . . . remedies of the holders of the bonds with respect thereto . . .
>
> In case an Event of Default (as defined by resolution 890) shall occur, the principal of the bonds . . . at such time outstanding may be declared due and payable by the Bond Fund Trustee or by the holders of 20% in principal amount of such Bonds . . . but such declaration may, under certain circumstances, be annulled.

Clerk's Papers, at 3219, 3221.

[18] Where bonds contain no restriction, either directly or by reference, against an action on them, a holder may maintain a separate action without reference to the provisions of an indenture regardless of the restrictions which might otherwise be binding. *See Snyder v. Yakima Fin. Corp.*, 174 Wash. 499, 508, 25 P.2d 108 (1933). In *Snyder*, however, the bonds contained *no* reference to restrictions on bondholders' rights to sue. *Snyder*, at 508. In cases where the bonds refer to the indenture agreement, bondholders are bound by the terms of the indenture. *See Colsky v. Eyres Storage & Distrib. Co.*, 178 Wash. 404, 407, 34 P.2d 1114 (1934). Plaintiffs and intervenors cite other decisions holding that passing reference to an indenture cannot restrict bondholders' rights to sue if the bond is not paid at maturity. Plaintiffs and intervenors ignore the distinction between restrictions placed on rights created by the indenture contract, *e.g.*, derivative authority, and rights existing apart from the contract, *e.g.*, right to enforce debt owed. Indeed, in *all* of the cases cited, unlike the present derivative action for negligence, the indenture involved restricted

the bondholders' rights to collect interest or principal when due. *See, e.g., Guardian Depositors Corp. v. David Stott Flour Mills, Inc.*, 291 Mich. 180, 185, 289 N.W. 122 (1939); *Scott v. Platt*, 171 Or. 379, 391, 135 P.2d 769, 775, 137 P.2d 975 (1943). *Bank of Cal. v. National City Co.*, 138 Wash. 517, 524, 244 P. 690, *rev'd on other grounds on rehearing*, 141 Wash. 243, 251 P. 561 (1926); *Friedman v. Airlift Int'l, Inc.*, 44 A.D.2d 459, 355 N.Y.S.2d 613, 614–15 (1974) (expressly distinguishing incorporation by reference of restrictions on suit for interest owed from incorporation by reference of a special collection right created by indenture). Here, the face of the WNP 4 and WNP 5 bonds referred readers to resolution 890 for a complete description of the remedies available to bondholders. A bondholder would necessarily look to the resolution to determine whether derivative rights existed, and would also discover restrictions on any such right created. Thus, the present case is distinguishable from situations where a bondholders' right to sue for principle and interest owed is involved. Moreover, resolution 890 was properly incorporated in the bonds.

Plaintiffs also argue that they are not bound by resolution 890 because they were induced to become parties to it by untrue statements and omissions of material facts in the Official Statements. However, no allegations of misstatements in resolution 890 are made in plaintiffs' complaint. In any event, misstatements in the Official Statements are not relevant to whether the WNP 4 and WNP 5 bonds adequately notified bondholders of the rights and restrictions created by resolution 890. Here, we find that the bonds gave bondholders notice of resolution 890, and thus that plaintiffs are bound by its terms. We therefore decline to reform the clear terms of resolution 890.

We also reject intervenors' attempt to sue in place of Chemical Bank pursuant to the language in the bonds giving holders of 20 percent in principal amount of the bonds the right to declare the bonds due upon default. Intervenors' derivative claims do not seek to declare the bonds

due, but rather are for negligence and malpractice against professionals not parties to the bonds.

We conclude that plaintiffs' and intervenors' derivative negligence claims are governed by resolution 890, and the demand requirements of section 11.5.

Alternatively, plaintiffs and intervenors assert that they were excused from the resolution 890 demand requirements. First, they argue that any demand on Chemical Bank would have been futile because they were not allowed to intervene in *Chemical Bank* II and because Chemical Bank has not supported them in their attempts to bring these derivative claims. They also contend that Chemical Bank waived the demand requirements by failing to object to this action.

[19] Few cases address the issue of whether and when a bondholder must comply with indenture demand requirements in indentures authorizing a trustee to sue derivatively in place of the corporation. *But see Quirke v. St. Louis–San Francisco R.R., supra* at 709 (upholding similar no action clause). However, cases interpreting Fed. R. Civ. P. 23.1, requiring shareholders to demand that the corporation sue before suing derivatively, provide guidance by analogy. The Fed. R. Civ. P. 23.1 demand requirement is intended to allow the corporation an opportunity to take over a suit brought on its behalf. *Lewis v. Graves*, 701 F.2d 245, 247 (2d Cir. 1983). Whether the demand requirement is excused is within the trial court's discretion. *DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826, 830 n.7 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964); 3B J. Moore, *Federal Practice* ¶ 23.1.19, at 23.1–83 (1987). Thus, a trial court's determination of whether demand requirements are excused will only be reversed for a manifest abuse of discretion. *Lewis*, at 248.

The doctrine of futility excuses demand on directors when the majority of the directors are the alleged wrongdoers. Note, *Demand on Directors and Shareholders as a Prerequisite to a Derivative Suit*, 73 Harv. L. Rev. 746, 753 (1960); 3B J. Moore, *Federal Practice* ¶ 23.1.19, at 23.1–87,

–89 (1987); *see, e.g., Jannes v. Microwave Communications, Inc.*, 57 F.R.D. 18, 21 (N.D. Ill. 1972); *First Wis. Nat'l Bank v. Brynwood Land Co.*, 245 Wis. 610, 15 N.W.2d 840 (1944) (demand upon bondholders futile because majority bondholders were engaged in acts giving rise to action); *GE Co. v. Bucyrus-Erie Co.*, 563 F. Supp. 970, 974 (S.D.N.Y. 1983); *Clark v. Lomas & Nettleton Fin. Corp.*, 625 F.2d 49, 53–54 (5th Cir.), *reh'g denied*, 632 F.2d 894 (1980), *cert. denied*, 450 U.S. 1029 (1981); *Clay v. Selah Vly. Irrig. Co.*, 14 Wash. 543, 548–49, 45 P. 141 (1896) (bondholders excused from notice where corporation conspired with trustee to dispose of property contrary to deed provisions and deceived them as to amount due on mortgage). However, it is well established that futility is not established by mere approval or acquiescence by a corporation. *Kaufman v. Safeguard Scientifics, Inc.*, 587 F. Supp. 486, 489 (E.D. Pa. 1984); *Lewis v. Graves*, 701 F.2d at 248. Finally, courts may excuse demand upon a trustee when the trustee is involved in a lawsuit arising out of the same facts asserting the same claims as the bondholders' claims. *Morgan Stanley & Co. v. Archer Daniels Midland Co.*, 570 F. Supp. 1529, 1539 n.2 (S.D.N.Y. 1983) (trustee intervened in bondholder suit rendering demand irrelevant); *Campbell v. Hudson & Manhattan R.R.*, 277 A.D. 731, 102 N.Y.S.2d 878, 882, *aff'd*, 302 N.Y. 902 (1951) (trustee's complaint urged that court grant relief requested by plaintiffs); *see Thornton v. Evans*, 692 F.2d 1064, 1080 (7th Cir. 1982) (court excused demand because trustees had notice of claims; trustees filed identical suit to beneficiaries' but failed to name certain defendants who breached trust).

Here, demand on Chemical Bank was not excused on the basis of futility. Chemical Bank is not the target of plaintiffs' and intervenors' allegations of negligence. Moreover, Chemical Bank's failure to sue the professionals does not excuse the demand requirements because Chemical Bank had no reason to take action. As noted by Chemical Bank's attorney at trial, "nobody has moved against us or we have not moved against anyone. So there's no reason for us to

take a position." Report of Proceedings vol. II, at 9. Likewise, Chemical Bank's failure to support plaintiffs' intervention in *Chemical Bank* II does not excuse demand. No claims against respondent professionals were involved there, and this court will not presume that Chemical Bank knew of any alleged negligence or malpractice.

Next, plaintiffs and intervenors contend that formal demand, by 20 percent of the bondholders should be excused because to do so would be too costly. This argument is without merit. We note that shareholders may be excused from serving demand on other shareholders as required by Fed. R. Civ. P. 23.1 when onerous expense is involved. *Messinger v. United Canso Oil & Gas Ltd.*, 80 F.R.D. 730, 738 (D. Conn. 1978); *Levitt v. Johnson*, 334 F.2d 815, 818 (1st Cir. 1964), *cert. denied*, 379 U.S. 961 (1965). However, locating 20 percent of the bondholders presents no onerous expense here because nearly 20 percent of the bondholders are already parties to this action. See Brief of Appellant Haberman, at 74; Brief of Intervenors, at 104.

Finally, plaintiffs argue that demand should be excused because the statute of limitations has run against the Supply System for its choses in action against the professionals for negligence. Plaintiffs contend that these actions will be lost if this court upholds the dismissal of these derivative claims.

At least one court has noted that a factor in determining whether shareholders are excused from Fed. R. Civ. P. 23.1 demand requirements is if a limitations period might run in the time necessary to serve such a demand. *Levitt*, at 817. However, whether a demand is excused because a limitations period will run is gauged at the time the action is commenced, not afterward with the benefit of hindsight. *Lewis v. Graves*, 701 F.2d at 250. Here, at the time plaintiffs and intervenors commenced this action in 1985, the statute of limitations had not yet run. Therefore, demand could have been served in 1985 to preserve these choses in action. Because excuse is measured at that time, plaintiffs

and intervenors cannot be excused from demand requirements on this basis.

We conclude that plaintiffs' and intervenors' double derivative claims against respondent professionals for negligence and malpractice were properly dismissed by the trial court. The claims are governed by the terms of resolution 890 and plaintiffs and intervenors have failed to meet the demand requirements contained in section 11.5. Because we determine that plaintiffs and intervenors have not met the procedural prerequisites to their claims, we need not address their substantive derivative claims against respondent professionals for malpractice and negligence.

D

Equitable Creditor Claims

Plaintiffs also allege their derivative claims as equitable creditors of the Supply System. They contend that the Supply System's rights of action against the respondent professionals constitute equitable assets recoverable by the creditor-bondholders to satisfy debts represented by the bonds.

[20] Such "creditor suits" are brought to compel the discovery and application of equitable assets or property to the payments of debts. However, "a general creditor with a mere legal demand may not, in the absence of statutory authorization, come into equity to collect his claim." 21 C.J.S. *Creditors' Suits* § 43 (1940). The debt must be reduced to judgment before an equitable creditor action can be brought. *Hamburger Apparel Co. v. Werner*, 17 Wn.2d 310, 317, 322, 135 P.2d 311 (1943); *see Woody's Olympia Lumber, Inc. v. Roney*, 9 Wn. App. 626, 513 P.2d 849 (1973) (allowing attachment of debtor's tort action after creditor's claim reduced to judgment).

Here, the trial court dismissed plaintiffs' claims as inadequately pleaded. Notwithstanding the pleadings, we hold that plaintiffs' equitable creditor claims fail for want of a judgment. The trial court properly dismissed all derivative claims.

VI

Negligent Misrepresentation and Fraud

The trial court dismissed intervenors' common law fraud and negligent misrepresentation claims against all respondents. The trial court concluded that intervenors' claims were barred by principles of discretionary immunity, the public duty doctrine, and sovereign immunity as applied to out–of–state respondents through choice of law rules. The trial court alternatively held that intervenors' negligent misrepresentation claims against the respondent professionals failed for lack of duty. Intervenors contend that their claims are not barred by immunity, and that their claims were alleged sufficiently to state claims for fraud and negligent misrepresentation against respondent professionals. We agree.

A

Discretionary Immunity

[21] Discretionary immunity is a narrow court–created exception to the Legislature's abolition of sovereign immunity. *Bender v. Seattle*, 99 Wn.2d 582, 587, 664 P.2d 492 (1983); *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 255, 407 P.2d 440 (1965). Discretionary immunity serves to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government. *Bender*, at 588; *King v. Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974). To be protected by such immunity, an act, omission, or decision must involve an exercise of basic policy evaluation, judgment and expertise by the governmental agency involved. *Evangelical United Brethren Church*, at 255. The activity must involve basic policy discretion rather than the implementation of policy. *Mason v. Bitton*, 85 Wn.2d 321, 327–29, 534 P.2d 1360 (1975); *Bender*, at 588–90. Thus, only "high level discretionary acts exercised at a truly executive level" are protected. *Bender*, at 588.

Arguably, the Supply System's decision to build the WNP 4 and WNP 5 is immune as a discretionary act.

However, intervenors challenge the means by which that decision was carried out. Intervenors allege that respondents made fraudulent statements and omissions, which were used in the Official Statements and Annual Reports by the Supply System to sell bonds to finance the project. Thus, the acts complained of by intervenors do not involve discretionary acts, or policy decisions by the Supply System; rather they involve the mechanism by which the Supply System implemented its decision to build the project. As a result, discretionary immunity does not bar intervenors' fraud claims. *See Miotke v. Spokane*, 101 Wn.2d 307, 337, 678 P.2d 803 (1984) (decision to build sewage bypass was not a basic policy decision protected by discretionary immunity because the decision was based on technical engineering and scientific judgment); *Stewart v. State*, 92 Wn.2d 285, 294, 597 P.2d 101 (1979) (decision to build a freeway was a basic policy decision, but its design and lighting was not protected by discretionary immunity). *Algona v. Pacific*, 35 Wn. App. 517, 520, 667 P.2d 1124, *review denied*, 100 Wn.2d 1028 (1983) (municipality furnishing sewer facilities functioning in proprietary capacity and not immune to suit).

B

Public Duty Doctrine

[22] The public duty doctrine determines the scope of duty involved where public services are provided. *J & B Dev. Co. v. King Cy.*, 100 Wn.2d 299, 303, 669 P.2d 468, 41 A.L.R.4th 86 (1983). The doctrine limits governmental liability arising out of its provision of public services to breach of a duty owed specifically to one plaintiff, rather than the public generally. *J & B Dev. Co.*, at 303–05.

Here, intervenors' allegations of fraud do not arise out of a service to the general public. Instead, they involve alleged fraud in the course of raising private funds for public use. Moreover, the Supply System issued its statements and reports pursuant to the securities laws, not a general public duty. We conclude that the public duty doctrine is inappli-

cable to this case.

C

Sovereign Immunity

The trial court also held that intervenors' common law fraud claims against respondent Oregon and Idaho Utilities were barred by Oregon and Idaho sovereign immunity principles. We disagree.

[23] Resolution 890, pursuant to which the Oregon and Idaho Utilities entered into the Participants' Agreements, provides that the resolution and the bonds be construed and governed by Washington law. Resolution 890, § 14.11. Although a choice of law provision in a contract does not govern tort claims arising out of the contract, it may be considered as an element in the most significant relationship test used in tort cases. *See Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 423, 635 P.2d 708 (1981).

When faced with claims of other states' immunity, this court uses the most significant relationship test, then evaluates the policies behind the interested states whose policies conflict. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 582, 555 P.2d 997 (1976); *Southwell v. Widing Transp., Inc.*, 101 Wn.2d 200, 204, 676 P.2d 477 (1984); *see also Biscoe v. Arlington Cy.*, 738 F.2d 1352, 1359 (D.C. Cir. 1984) (states faced with claims of immunity by sister states have resolved the issue by reference to the forum state's policy on comity, not by rigid application of choice of law rules), *cert. denied*, 469 U.S. 1159 (1985). The elements of the significant relationship test include: (a) the place of injury; (b) the place where the conduct causing the injury occurred; (c) the residence of the parties; and (d) the place where the relationship is centered. Restatement (Second) of Conflict of Laws § 145 (1971).

Here, the most significant relationship is with Washington. A significant number of the parties to this action are Washington residents. The fraudulent acts occurred here where the Supply System, and thus the relationship is centered. Moreover, the planning of the project, the issuance of

bonds, and the rendering of allegedly fraudulent services occurred here. Finally, the statements and reports containing the injurious misrepresentations originated in Washington. See also section IV(D).

The policies of the states involved also dictate our application of Washington law. Oregon and Idaho Utilities claim that sovereign immunity reflects their states' interests in protecting their public fisc and ability to govern their operations. On the other hand, the Washington Legislature waived sovereign immunity to discourage tortious governmental conduct, and to hold government responsible for its acts. *Bender v. Seattle, supra* at 590. We believe our application of Washington law here furthers the Washington Legislature's purpose without interfering with Oregon's or Idaho's ability to govern. Our decision recognizes this State's policy of holding government accountable for tortious conduct and only applies to Oregon and Idaho respondents to the extent they acted tortiously in Washington.

Respondents also argue that full faith and credit and comity require that we apply Oregon and Idaho sovereign immunity principles. We disagree.

[24, 25] Full faith and credit does not require a forum state to respect another state's rule on sovereign immunity unless the other state's ability to govern would be threatened. *Nevada v. Hall*, 440 U.S. 410, 424 n.24, 59 L. Ed. 2d 416, 99 S. Ct. 1182, *reh'g denied*, 441 U.S. 917 (1979); *see Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 96, 658 P.2d 422, *cert. dismissed*, 464 U.S. 806 (1983). Moreover, the doctrine of comity is not a rule of law, but one of practice, convenience and expediency. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488, 44 L. Ed. 856, 20 S. Ct. 708 (1900). Comity allows the courts of one jurisdiction to give effect to laws of another jurisdiction out of deference and respect, considering the interests of each state. *Mianecki*, at 97. The decision to invoke comity is within the court's discretion. *Mianecki*, at 98. *Smith v. Fletcher*, 102 Wash. 218, 222, 173 P. 19 (1918). Comity does not preclude

one state from exercising jurisdiction over another state because of that state's sovereign immunity, especially over claims arising out of securities purchases. *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 583, 404 N.E.2d 726, 427 N.Y.S.2d 604 (1980) (any other rule would burden financial institutions with reviewing the laws of every jurisdiction before consenting to do business with any agency of a state).

We conclude that Washington law applies and that the Oregon and Idaho Utilities are not immune to intervenors' common law claims. Therefore, we reverse the trial court's ruling that intervenors' claims are barred by immunity principles.

D

Intervenors' Negligent Misrepresentation Claims Against Professionals

The trial court alternatively dismissed intervenors' claims against the professionals on the basis that the professionals owed no duty beyond that owed to their individual client, the Supply System. We disagree. Intervenors alleged that respondent professionals made and participated in making negligent misrepresentations of fact in the Official Statements and Annual Reports, and negligently omitted facts necessary to make the statements and reports not misleading. Intervenors further alleged that they sufficed pecuniary loss in reliance on the information contained, or not contained, in the statements and reports.

[26] To determine whether a plaintiff has stated a claim for negligent misrepresentation, this court adheres to the standards in the Restatement (Second) of Torts § 552(1), (2) (1977) which provides:

> (1) One who, in the course of his business, profession or employment or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or

communicating the information.

(2) Except as stated in Subsection (3), [which pertains to the liability of one who is under a public duty to furnish such information] the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Transamerica Title Ins. Co. v. Johnson, 103 Wn.2d 409, 415–16, 693 P.2d 697 (1985); *Wilbur v. Western Properties*, 22 Wn. App. 458, 463, 589 P.2d 1273 (1979).

In deference to legitimate fears of indeterminate liability to third persons, the Restatement narrows the scope of an action for negligent misrepresentations. Liability does not extend to every person who ultimately becomes aware of the misstatement. Instead, because of the "important social policy of encouraging the flow of commercial information upon which the operation of the economy rests", the defendant must be "manifestly aware of the use to which the information was to be put and intended to supply it for that purpose." Restatement (Second) of Torts § 552, comment *a* (1977). Indeed, "[w]hen there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences." Restatement (Second) of Torts § 552, comment *a*. Liability for negligent misrepresentations is thus limited to cases where (1) the defendant has knowledge of the specific injured party's reliance; or (2) the plaintiff is a member of a group that the defendant seeks to influence; or (3) the defendant has special reason to know that some member of a limited group will rely on the information. *See Chubb Group of Ins. v. C.F. Murphy & Assocs.*, 656 S.W.2d 766 (Mo. Ct. App. 1983). However,

> it is not necessary that the maker should have any particular person in mind as the intended, or even the probable, recipient of the information. In other words, it is not required that the person who is to become the plaintiff be identified or known to the defendant as an individual when the information is supplied. It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it. It is enough, likewise, that the maker of the representation knows that his recipient intends to transmit the information to a similar person, persons or group. It is sufficient, in other words, insofar as the plaintiff's identity is concerned, that the maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given.

Restatement (Second) of Torts § 552, comment *h* (1977).

Here, the trial court's CR 12(b)(6) dismissal of intervenors' misrepresentation claims must be reversed. Assuming intervenors' allegations to be true, and considering all conceivable facts in support of them, we cannot say that intervenors have failed to state a claim. *See Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986).

Intervenors specifically allege that respondent professionals negligently supplied information to the Supply System, and that the information appeared in the Official Statements and Annual Reports relied upon by intervenors in their decisions to purchase the bonds. As a result of their reliance, intervenors allege pecuniary loss. Additionally, intervenor Amexco alleges that several respondent professionals made personal visits and telephone calls on several occasions to discuss the bonds. Respondents contend that this court should not consider these allegations because they did not appear in intervenors' first amended complaint, and because the telephone calls were raised for the first time on this appeal. However, bound by the CR

12(b)(2) standard of review here, we consider these allegations as hypothetical facts forming a viable conceptual background for the alleged negligent misrepresentations made by respondent professionals. *See Halvorson v. Dahl*, 89 Wn.2d 673, 674–75, 574 P.2d 1190 (1978).

Moreover, it is conceivable that each of the respondent professionals were told by the Supply System of its intent to supply information received from the professionals directly to institutional investors such as the intervenors, either specifically, or as a limited class to induce them to purchase bonds. In such circumstances, intervenors would be part of a limited group which the professionals knew would receive their information and rely on it in making a decision to purchase bonds. Conceivably, the professionals could have intended that intervenors, as institutional investors, benefit from the information so as to induce them to purchase bonds, resulting in favorable bond sales and pecuniary gain to the professionals.

However, because the trial court dismissed intervenors' allegations on the pleadings, we have no factual basis from which to discern respondent professionals' knowledge or intentions. Because this information is necessary to a determination of whether a duty exists to intervenors for alleged misrepresentations, we must remand to the trial court for further factual determinations.

E

Intervenors' Common Law Fraud Claims

In addition to their negligent misrepresentation claims, intervenors also allege fraudulent misrepresentation by all respondents in the Official Statements and Annual Reports.

Respondents first argue that intervenors failed to plead fraud with particularity as required by CR 9(b). The trial court did not decide this issue, but noted that any deficiencies could be cured by a motion for more definite statement. Report of Proceedings vol. III, at 16. Nevertheless, respondents argue that: (1) no allegations that any respondent other than the Supply System supplied information to

them appear within intervenors' complaint; (2) intervenors fail to set forth the allegedly fraudulent acts by each respondent; and (3) the allegations in the complaint are too general.

CR 9(b) requires dismissal when a complaint fails to plead fraud with particularity. CR 9(b), like its federal counterpart, Fed. R. Civ. P. 9(b), ensures that plaintiffs seek redress for a wrong rather than use lawsuits as pretexts to discover unknown wrongs, protects defendants from unnecessary harm to their reputation, and gives defendants sufficient notice to enable them to prepare a defense. *See D & G Enters. v. Continental Ill. Nat'l Bank & Trust Co.*, 574 F. Supp. 263, 266–67 (N.D. Ill. 1983); *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). The complaining party must plead both the elements and circumstances of fraudulent conduct. 3A L. Orland, Wash. Prac. 129 (3d ed. 1980). Applying CR 9(b) in light of CR 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief", a complaint must allege specific fraudulent acts, but need not plead evidentiary matters. *See D & G Enterprises*, at 267; *Trak Microcomputer Corp. v. Wearne Bros.*, 628 F. Supp. 1089, 1092 (N.D. Ill. 1985); *Somerville v. Major Exploration, Inc.*, 576 F. Supp. 902, 909 (S.D.N.Y. 1983).

[27] To determine whether allegations of fraud satisfy CR 9(b), the court will consider only the complaint, and not additional allegations made in the briefs. *See Beck v. Cantor, Fitzgerald & Co.*, 621 F. Supp. 1547, 1552 (N.D. Ill. 1985). A complaint adequately alleges fraud if it informs the defendant of who did what, and describes the fraudulent conduct and mechanisms. *Beck*, at 1552 n.3; *Lewis v. Berry*, 101 F.R.D. 706, 708–09 (W.D. Wash. 1984). If a complaint provides this information, then group conduct may be pleaded generally because the defendants have sufficient information to answer the allegations. *In re Equity Funding Corp. of Am. Sec. Litig.*, 416 F. Supp. 161, 181 (C.D. Cal. 1976). "[W]hen a plaintiff sues individual group members on the basis of the collective product of the group,

specific allegations about the role of each defendant are unnecessary." *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 593 (E.D. Mich. 1985).

Here, intervenors' complaint specifies the allegedly fraudulent information supplied or omitted by each respondent to the Supply System, the individual respondent compiling and disseminating this information, and what statements were in the Official Statements and Annual Reports. Clerk's Papers, at 640–53; First Amended Complaint, paras. 12–57. Intervenors' complaint then alleges the elements of fraud based on the assertions made in, or omitted from, the Official Statements and Annual Reports. Clerk's Papers, at 692–94; First Amended Complaint, paras. 195–201. Although the pleadings do not set forth circumstances illustrating respondents' knowledge of their misrepresentations (scienter), CR 9(b) specifies that knowledge may be averred generally. Therefore, as intervenors' complaint gave respondents sufficient notice of the allegations to allow them to prepare their answer and defense, we conclude that intervenors' complaint satisfies the CR 9(b) particularity requirement as to their fraud claims.

Respondents next argue that they owed no duty to intervenors in the absence of privity or a fiduciary relationship. They point out that no respondent other than the Supply System represented anything directly to the bondholders in the Official Statements and Annual Reports.

[28] While Washington cases allowing recovery for fraud generally involve privity or fiduciary relationships between the parties, allegations of fraud may be asserted where one party to a transaction has a duty to speak because that party possesses superior knowledge yet that party fails to state, or has no basis for, an asserted material fact. *See, e.g., Lincoln v. Keene*, 51 Wn.2d 171, 174, 316 P.2d 899 (1957); *Hamilton v. Mihills*, 92 Wash. 675, 680, 159 P. 887 (1916); *Kaas v. Privette*, 12 Wn. App. 142, 149, 529 P.2d 23 (1974).

Other courts have held defendants liable for concealment

or misstatements absent privity when the defendant knows that information will be passed on to the plaintiff or to a class of person who the defendant intends to induce reliance. *See, e.g., Fischer v. Kletz*, 266 F. Supp. 180, 187 (S.D.N.Y. 1967) (where affirmative misrepresentation was involved, accountant was liable regardless of his interest in the transaction); *Bank of Vly. v. Mattson*, 215 Neb. 596, 597-98, 339 N.W.2d 923 (1983) (borrower's fraudulent misrepresentations regarding his finances made to second party constituted fraud on third party plaintiff who was approached by second party to raise money for borrower).

Additionally, while requiring privity, a fiduciary relationship, or a limited class is warranted in negligent misrepresentation cases where a defendant is merely negligent and should not be held potentially liable to an unlimited number of plaintiffs, the same reasoning does not apply where a defendant knowingly makes a misrepresentation.

The Restatement (Second) of Torts provides:

> One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons *whom he intends or has reason to expect to act or to refrain from action* in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.

(Italics ours.) Restatement § 531.

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, *is made to a third person and the maker intends or has reasons to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction* or type of transaction involved.

(Italics ours.) Restatement § 533.

> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented

the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be *necessary to prevent his partial or ambiguous statement of the facts from being misleading;* and

. . .

(e) *facts basic to the transaction*, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, *would reasonably expect a disclosure of those facts.*

(Italics ours.) Restatement § 551. Thus, while a duty in a fraud case may be owed by a defendant to plaintiffs in privity, a fiduciary relationship, or a limited class of persons, a duty may also arise to those third persons whom the defendant intends or has reason to expect will receive the information, especially in a business transaction where a defendant has knowledge necessary to prevent misrepresentation, or facts basic to the transaction where the plaintiff would reasonably expect disclosure.

Here, with the trial court's CR 12(b)(6) dismissal in mind, we assume that respondents gave information to the Supply System knowing or intending that the Supply System would pass the information onto the intervenors in the Official Statements and Annual Reports. The respondents also have superior knowledge of facts basic to the transaction which they knew or reasonably should have expected intervenors to expect disclosure. Thus, respondents may have owed a duty to intervenors even absent privity or a fiduciary relationship.

VII

Consumer Protection Act Claims

Intervenors challenge the trial court's dismissal of their Consumer Protection Act (CPA), RCW 19.86, claims against respondent professionals, irrigation districts and rural electric cooperatives. Intervenors concede that the remaining respondents are exempt from the CPA as municipal corporations or political subdivisions of the state. *See Washington Natural Gas Co. v. PUD 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

A

Respondent Professionals

[29] The trial court held that intervenors' allegations of unfair and deceptive acts or practices in connection with the sale of bonds by respondent professionals failed to state a claim under the CPA as interpreted by this court in *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984). In *Short*, this court held that the term "trade or commerce" used by the CPA only includes the entrepreneurial or commercial aspects of the professional practice of law, not the substantive quality of services provided. Claims "directed to the competence of and strategy employed" by attorneys constitute allegations of negligence or malpractice in performing professional services and, as such, are not actionable under the CPA. *Short*, at 61.

Intervenors do not dispute that *Short* is applicable to the respondent professionals here. Rather, the intervenors contend that their claims amount to allegations of unfair or deceptive acts in the entrepreneurial aspects of the professionals' businesses. We disagree.

Intervenors allege that all professionals rendered services negligently to the Supply System. The intervenors do not challenge the professionals' fee rates, billing or client relationships. We conclude that because intervenors' allege only negligence or malpractice against the respondent professionals, they do not state a claim under the CPA. Intervenors' bald assertions that the respondent investment

advisors were, by definition, engaged in entrepreneurial aspects of their business are without merit. In their professional malpractice claims against the respondent advisors, intervenors attack the advisors' exercise of professional judgment, not the entrepreneurial aspects of their services. Therefore, we affirm the trial court's dismissal of intervenors' CPA claims against respondent professionals.

B

Irrigation Districts

Intervenors claim that because respondent irrigation districts perform no governmental functions, they are not municipal corporations exempt from the CPA. Intervenors rely on *State v. Human Relations Research Found.*, 64 Wn.2d 262, 266, 391 P.2d 513 (1964). In *Human Relations*, however, the question whether an irrigation district was a municipal corporation was not before the court; rather, the court was faced with the issue of the district's interest in compensation for state condemnation of its land. In this context the court reasoned that the district was entitled to compensation for the condemnation because it performed no governmental function. *Human Relations*, at 266.

[30] Other cases hold that irrigation districts are undeniably municipal corporations created by the Legislature for a public purpose. *See State ex rel. Clancy v. Columbia Irrig. Dist.*, 121 Wash. 79, 84, 208 P. 27 (1922); *In re Columbia Irrig. Dist.*, 183 Wash. 425, 437, 48 P.2d 648 (1935); *Outlook Irrig. Dist. v. Fels*, 176 Wash. 211, 219, 28 P.2d 996 (1934); *Washington Nat'l Inv. Co. v. Grandview Irrig. Dist.*, 175 Wash. 644, 648, 28 P.2d 114 (1933); *Roberts v. Richland Irrig. Dist.*, 169 Wash. 156, 160, 13 P.2d 437 (1932), *aff'd*, 289 U.S. 71 (1933); *Richland Irrig. Dist. v. De Bow*, 149 Wash. 242, 246, 270 P. 816 (1928); *Burbank Irrig. Dist. 4 v. Douglass*, 143 Wash. 385, 396, 255 P. 360, 259 P. 881 (1927); *Peters v. Union Gap Irrig. Dist.*, 98 Wash. 412, 414, 167 P. 1085 (1917); *Brown Bros. v. Columbia Irrig. Dist.*, 82 Wash. 274, 283–84, 144 P. 74 (1914); *Roza Irrig. Dist. v. State*, 80 Wn.2d 633, 634, 497 P.2d 166 (1972).

Therefore, we conclude that respondent irrigation districts are municipal corporations and, as such, are exempt from the CPA under *Washington Natural Gas Co. v. PUD 1, supra* at 98.

C

Rural Electric Cooperatives

Intervenors take exception to the trial court's conclusion that because rural electric cooperatives are otherwise regulated, they are exempt from the CPA. The CPA exempts "transactions permitted by any other regulatory body". RCW 19.86.170. *See Tokarz v. Frontier Fed. Sav. & Loan Ass'n*, 33 Wn. App. 456, 464 n.5, 656 P.2d 1089 (1982). The Rural Electrification Administration (REA), a federal agency, closely monitors and extensively controls the acts of rural electric associations borrowing money from the REA. *In re Dairyland Power Coop.*, 37 F.P.C. 12, 18 (1967). Here, however, the record contains no assertion that any of the respondent electrical associations were Administration borrowers and therefore subject to such control by the REA.

[31] Nevertheless, as the rural electric cooperatives, like the respondent PUD's and municipal utilities, are nonprofit, consumer–owned utilities serving those who reside within their service areas, there exists no public policy reason as expressed by the CPA why the cooperatives should not be likewise exempt from the CPA. Moreover, these entities allegedly violated the CPA only by virtue of their relationship with the Supply System, which is exempt from the CPA. We conclude that to subject the respondent rural electric cooperatives to potential CPA liability would be contrary to the Legislature's purpose in excluding municipal corporations from liability under the CPA. Therefore, we hold in light of the unique facts of this case that, like the Supply System and other governmental entities admittedly exempt from the CPA, respondent rural electric cooperatives are also exempt from the CPA under our reasoning in *Washington Natural Gas Co. v. PUD 1, supra* at 98. We affirm the trial court's dismissal of intervenors' CPA

claims against respondents.

VIII

Amendment of Complaint

Although plaintiffs agree with the trial court's ruling allowing them to amend their original complaint to add new plaintiffs, they challenge the trial court's refusal to allow those new plaintiffs' claims to relate back to the original filing date for statutes of limitation purposes.

Respondents argue, and the trial court held, that CR 15(c) applies only to the relation back of claims against newly added defendants, not newly added plaintiffs. We disagree.

CR 15(c) provides:

> **(c) Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The advisory committee note to Fed. R. Civ. P. 15(c) from which CR 15(c) was derived, states that rule 15(c) extends by analogy to plaintiffs. *See* Advisory Committee Note to the 1966 amendment to rule 15(c), 39 F.R.D. 82–84 (1966); 3 J. Moore, *Federal Practice* ¶ 15.15[4.–2], at 15–169 (2d ed. 1985); 6 C. Wright & A. Miller, *Federal Practice* § 1501, at 524 (1971). We find these comments persuasive.

[32] Respondents argue that to allow new plaintiffs' claims to relate back in this case would amount to granting them a new cause of action after the applicable statutes of

limitations had run. Since the amendment of CR 15(c), however, we have rejected this argument. Indeed, once the notice and prejudice requirements of CR 15(c) have been met, any amendment does not subvert the policies of the statute of limitations. *North St. Ass'n v. Olympia*, 96 Wn.2d 359, 368, 635 P.2d 721 (1981). "Rule 15(c), as amended, dovetails with the policies of the limitation statutes." *North St. Ass'n*, at 368. Moreover, "[a]s long as a defendant is fully apprised of a claim arising from specific conduct and has prepared to defend the action against him, he will not be prejudiced by the addition of a new plaintiff and thus should not be allowed to raise a limitations defense." 6 C. Wright & A. Miller, *Federal Practice* § 1501, at 272 (Supp. 1986).

Thus, we conclude that the notice and prejudice principles contained in CR 15(c) extend by analogy to the relation back of amendments adding new plaintiffs. Thus, a court must determine whether the requirements of CR 15(c) are met and the court must determine whether failure to join the plaintiffs earlier was the result of inexcusable neglect. *See South Hollywood Hills Citizens Ass'n v. King Cy.*, 101 Wn.2d 68, 77, 677 P.2d 114 (1984).

Plaintiffs also challenge the trial court's denial of their request to amend their complaint to add defendants. Plaintiffs sought to add as parties several directors and officers of respondent R. W. Beck and Associates, Raytheon Company as parent corporation of respondent United Engineers, and Enserch Corporation as owner of respondent Ebasco Services. The trial court held that plaintiffs' failure to join these defendants was the result of inexcusable neglect.

[33] Plaintiffs contend that delay, excusable or not, is not sufficient to support the trial court's denial of their motion. Instead, plaintiffs argue that a showing of specific prejudice by the nonmoving party must be shown. *See Caruso v. Local 690, Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983) (delay alone insufficient to support denial of leave to amend to add new claims). How-

ever, in cases where leave to amend to add additional defendant has been sought, this court has clearly held that inexcusable neglect alone is a sufficient ground for denying the motion. *North St. Ass'n*, at 368; *Tellinghuisen v. King Cy.*, 103 Wn.2d 221, 223, 691 P.2d 575 (1984); *South Hollywood Hills Citizens Ass'n v. King Cy., supra* at 77. Generally, inexcusable neglect exists when no reasons for the initial failure to name the party appears in the record. *South Hollywood Hills Citizens Ass'n*, at 78. If the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be held to be inexcusable. *See* 3A L. Orland, Wash. Prac., comment § 5185, at 43–44 (3d ed. 1986 Supp.); *Tellinghuisen*, at 224 (no excuse where identity of omitted parties was matter of public record); *South Hollywood Hills Citizens Ass'n*, at 77 (no excuse because identity of omitted parties was matter of public record).

Here, plaintiffs only contend that they could not have discovered the identity of the defendants earlier. The record does not indicate plaintiffs' reasons. Nevertheless, the record shows that the identities of all the defendants sought to be added was readily available to plaintiffs from a variety of public sources. See, *e.g.*, Clerk's Papers, at 867 (outlining public documentation of respondent Ebasco's ownership by proposed new defendant Enserch); Plaintiffs' Supplemental Clerk's Papers, at 20 (detailing proposed new defendant Raytheon's ownership of respondent United Engineers); Clerk's Papers, at 779 (setting out annual reports filed with Washington Secretary of State identifying proposed new defendant officers and directors of respondent R. W. Beck and Associates, Inc.).

Plaintiffs' failure to avail themselves of this information prior to their third amended complaint, without evidence in the record to the contrary, supports the trial court's conclusion that plaintiffs' failure to name these defendants originally was the result of inexcusable neglect. Therefore, the trial court did not abuse its discretion in denying plaintiffs' request for leave to amend its complaint to

include additional defendants.

IX

Service of Process

Plaintiffs challenge the trial court's dismissal of defendants Donald Patterson and Stanley Pardo on the basis of defective service of process. Patterson is a former officer of respondent Blyth, Eastman, Paine, Webber, Inc.; Pardo is presently an officer of respondent Paine Webber, Inc.

A civil action in the superior court is commenced by service of a copy of a summons, together with a copy of the complaint, as provided in CR 4. *See* CR 3. RCW 4.28.080 details the appropriate method of service of process for specific types of defendants. RCW 4.28.080(14), which describes the proper method of service for all defendants not specifically covered in sections 1–13, provides for service as follows:

> In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his usual abode with some person of suitable age and discretion then resident therein.

Concerning personal service *out–of–state*, which is applicable in the present situation, CR 4(e)(2) provides:

> Although rule 4 does not generally apply to personal service out of state, the prescribed form of summons may, with the modifications required by statute, be used for that purpose. See RCW 4.28.180.

RCW 4.28.180 provides:

> Personal service out of state. Personal service of summons or other process may be made upon any party outside the state. If upon a citizen or resident of this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of personal service within this state; otherwise it shall have the force and effect of service by publication. The summons upon the party out of the state shall contain the same *and be served in like manner as personal summons within the state*, except it shall require the party to appear and answer within sixty days after such personal service out of the state.

Proof of service is provided for in CR 4(g) which states in relevant part:

> Proof of service shall be as follows:
>
> . . .
>
> (6) In case of personal service out of the state, the affidavit of the person making the service, sworn to before a notary public, with a seal attached, or before a clerk of a court of record.

While the affidavit of service, regular in form and substance, is presumptively correct, the return is subject to attack and may be discredited by competent evidence. *Lee v. Western Process Co.*, 35 Wn. App. 466, 469, 667 P.2d 638 (1983). Affidavits sworn to by individuals purportedly served asserting that they were not in fact personally served are considered by the courts as competent evidence discrediting averments to the contrary in affidavits of service. *See, e.g., Lee*, at 469.

Here, at the time service was purportedly made on his wife at his residence, neither Patterson nor his wife was at home. While Patterson's wife was allegedly served at home in New Jersey on August 15, 1984, she was in fact vacationing in Massachusetts from July 4, 1984, to September 2, 1984. See Affidavit of Jane Patterson; Clerk's Papers, at 1517. Moreover, Patterson was not at home any time between August 12, 1984, and August 19, 1984. See Affidavit of Donald Patterson; Clerk's Papers, at 1513. Patterson only discovered the summons and complaint when he returned home to find them on his porch, Clerk's Papers, at 1514, and has no recollection of receiving the copies purportedly mailed to him, Clerk's Papers, at 1515.

Plaintiffs affidavit of service on Pardo demonstrates defective service on its face, purporting to have served his personal secretary at his usual place of business on August 13, 1984, rather than at his residence. Additionally, Pardo's personal secretary has no recollection of the service at his place of business. See Affidavit of Sharon O'Reilly; Clerk's Papers, at 1524. No attempt was made to serve Pardo at his residence. Pardo discovered the summons and complaint

among the mail at his office sometime subsequent to August 13, 1984. See Affidavit of Stanley Pardo; Clerk's Papers, at 1521.

Plaintiffs do not dispute the Patterson and Pardo affidavits. Instead, they contend that their service of process constituted substantial compliance with procedural rules because both Patterson and Pardo eventually received notice of their suit. We disagree.

[34] Initially, we observe that mere receipt of process and actual notice alone do not establish valid service of process. *See Spokane v. Department of Labor & Indus.*, 34 Wn. App. 581, 584, 663 P.2d 843, *review denied*, 100 Wn.2d 1007 (1983). Moreover, substantial compliance with out-of-state service requirements has been recognized only where the defect in service involved a late filing of nonresidency affidavits as required by RCW 4.28.185(4). *See Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 472, 403 P.2d 351 (1965), *cert. denied*, 382 U.S. 1025 (1966); *Ryland v. Universal Oil Co.*, 8 Wn. App. 43, 45, 504 P.2d 1171 (1972); *Hatch v. Princess Louise Corp.*, 13 Wn. App. 378, 379, 534 P.2d 1036 (1975).

Here, the service was more than technically defective; the statutory procedures to ensure proper notice to nonresident defendants were not followed. As statutes authorizing service on out-of-state parties are in derogation of common law personal service requirements, they must be strictly pursued. *See State ex rel. Hopman v. Superior Court*, 88 Wash. 612, 617, 153 P. 315 (1915) (comparing out-of-state service statutes to service by publication).

The Washington long-arm statute was clearly not strictly pursued in the instant case. Mr. Patterson was *not* personally served, nor was the process delivered to a person of suitable age or discretion at his home. Rather, the summons and complaint were left outside the door of his house at a time when no one was present. Likewise, service upon Mr. Pardo was neither made upon him personally, nor upon a person of suitable age or discretion at his home. Rather, the summons and complaint were either mailed to him, or

dropped off at his place of business.

Finally, plaintiffs contend that service was made pursuant to the trial court's order granting plaintiffs leave to serve their third amended complaint on counsel for all defendants appearing in this action. Plaintiffs argue that because they served the complaint on Patterson and Pardo's counsel pursuant to that order, service was properly made pursuant to CR 4(e)(1) (providing that service may be made in manner prescribed by court order providing for service of summons and complaint).

Plaintiffs' argument is without merit. Voluntary appearances by defendants do not preclude their rights to challenge sufficiency of service pursuant to CR 12(b). CR 4(d)(5); *Adkinson v. Digby, Inc.*, 99 Wn.2d 206, 209, 660 P.2d 756 (1983). Moreover, the trial court's order allowing service of the third amended complaint did not provide for service of a summons. See Clerk's Papers, at 993. Thus, the order does not fall within the scope of CR 4(e)(1), and does not negate the original defective service.

We conclude that the trial court properly dismissed defendants Patterson and Pardo.

Conclusion

For the reasons stated in our foregoing analysis, we reverse the trial court's judgment as to plaintiffs' and intervenors' claims under the Securities Act of Washington and intervenors' common law fraud and negligent misrepresentation claims. We also reverse the trial court's denial of plaintiffs' motion to allow the claims of newly added plaintiffs to relate back to the original filing date of this action. The trial court's judgment as to all remaining claims is affirmed.

We remand this case to the trial court for further proceedings consistent with this opinion.

Utter, Dore, Goodloe, and Durham, JJ., and Wetherall, J. Pro Tem., concur.

Pearson, C.J. (dissenting)—I would affirm the trial

court's dismissal of all plaintiffs' and intervenors' Washington State Securities Act (WSSA) claims pursuant to CR 12(b)(6), as none of the complaints assert the necessary privity required to establish an action under RCW 21.20.430(1). Further, the majority has, in my opinion, misapplied the Restatement of Torts section 552 to allow the intervenors' negligent misrepresentation claims to stand. Therefore, I dissent.

I

Washington State Securities Act Claims

A

Proper Construction of the WSSA

First and foremost, the reasonable interpretation of RCW 21.20.430(1) requires privity between plaintiff and defendant. The majority's expansive denomination of parties liable in a private action is without basis under the clear language of the WSSA.

This court interprets statutory language to implement legislative intent. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986). The authoritative indicator of legislative intent is the plain and unambiguous meaning of the words in a statute. *State v. Johnson*, 104 Wn.2d 179, 181, 703 P.2d 1052 (1985). When the language of a statute is clear, the court must respect its ordinary meaning. *People's Org. for Wash. Energy Resources v. Utilities & Transp. Comm'n*, 104 Wn.2d 798, 825, 711 P.2d 319 (1985). The ordinary and clear meaning of "is liable to the person buying the security from him or her" in RCW 21.20.430(1) requires that the plaintiff bought a security from the defendant—that is, privity. Although the Washington Legislature has substantially altered section .430 during the ongoing development of numerous § 12(2) interpretations in the federal circuits, the original language in subsection .430(1) requiring privity remains intact. The majority ignores that legislative intent can be implemented only by retaining the plain meaning of that subsection.

Also, including only actual sellers under subsection .430(1) retains the net of liability obviously contemplated by the scheme of section .430. We interpret statutory language to render all sections meaningful. *State v. Q.D.*, 102 Wn.2d 19, 23, 685 P.2d 557 (1984). Only a strict privity approach ensures meaningful application of all portions of section .430; the majority's substantial factor–proximate cause approach renders subsection .430(3) repetitious and meaningless. For example, under the majority's interpretation an employee who falls under subsection .430(3) because he or she materially aids in the sale also necessarily falls under subsection .430(1) as a substantial factor causing the sale. Under a privity approach, however, the party who actually sold the security to the plaintiff is liable under subsection .430(1), and in subsection .430(3) the Legislature specifically delineated other parties liable by virtue of their status, knowledge, and participation in the sale, such as employees who materially aid.[2] Hence, the privity plainly required under the reasonable construction of the WSSA language avoids rendering subsection .430(3) superfluous.

Furthermore, the majority's comparison to the comments of the Uniform Securities Act is without merit. Our Legislature has not espoused that act and its comments in any part; indeed, only two states have adopted the act, and then with numerous variations. Unif. Sec. Act (1985), 7B U.L.A. 30 (Supp. 1987). Whether other states will adopt the act is not only speculative but improbable, because both

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[2]RCW 21.20.430(3) provides:

"Every person who directly or indirectly controls a seller or buyer liable under subsection (1) or (2) above, every partner, officer, director or person who occupies a similar status or performs a similar function of such seller or buyer, every employee of such a seller or buyer who materially aids in the transaction, and every broker–dealer, salesperson, or person exempt under the provisions of RCW 21.20.040 who materially aids in the transaction is also liable jointly and severally with and to the same extent as the seller or buyer, unless such person sustains the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable."

the American Bar Association and the North American Securities Administrators Association criticized and refused to endorse it. *See* 19 Sec. Reg. & L. Rep. (BNA) 264 (1987); 18 Sec. Reg. & L. Rep. (BNA) 399 (1986).

The majority's reliance on tort law is also inappropriate and without merit. The question of the existence of a *statutory* cause of action is one of statutory construction; the majority's argument based on tort principles, therefore, is entirely misplaced. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979); *SEC v. Seaboard Corp.*, 677 F.2d 1289, 1294 n.4 (9th Cir. 1982). The WSSA does not supplant or mirror tort law remedies available to an injured party in a securities transaction. *Accord, Ging v. Parker-Hunter, Inc.*, 544 F. Supp. 49, 52 (W.D. Pa. 1982). In fact, the securities laws were created specifically to regulate a unique aspect of commerce that no other area of law touches upon, including common law tort. *See Bowden v. Robinson*, 67 Cal. App. 3d 705, 712, 136 Cal. Rptr. 871 (1977). It is for this very reason that the intervenors' common law negligent misrepresentation and fraud claims are treated and analyzed as actions separate from the WSSA claims.

B

Interpretation Mirroring Section 12(2)

The majority incorrectly imposes a meaning on the WSSA that allegedly mirrors the current federal circuit court trend in interpreting § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) (1982). Although this court must not interfere with federal enforcement of the 1933 and 1934 securities acts, we need not interpret the WSSA in a duplicate manner. *Kittilson v. Ford*, 93 Wn.2d 223, 227, 608 P.2d 264 (1980).

Mirrored interpretation is improper because the purposes of the federal securities acts differ sharply from the purpose of the WSSA. Federal securities laws enforce disclosure and maintain integrity in the secondary securities markets, while the WSSA protects investors. Enforcement of the lat-

ter purpose is the only proper "broad remedial purpose" pursuant to which the WSSA should be interpreted. *See Garretson v. Red–Co., Inc.*, 9 Wn. App. 923, 927–28, 516 P.2d 1039 (1973) (primary function of court is to carry out the legislative purpose of the WSSA); *see also Touche Ross & Co. v. Redington*, 442 U.S. at 578 ("generalized references to the 'remedial purposes' of the 1934 Act will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit.' *SEC* v. *Sloan*, 436 U. S. 103, 116 (1978); see *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 200."). For this reason, we have in past cases employed the WSSA solely to enforce honesty in direct dealings between individuals. *See, e.g., McClellan v. Sundholm*, 89 Wn.2d 527, 534, 574 P.2d 371 (1978); *Clausing v. DeHart*, 83 Wn.2d 70, 73, 515 P.2d 982 (1973); *Kaas v. Privette*, 12 Wn. App. 142, 150, 529 P.2d 23 (1974). In fact, research has revealed no jurisdiction that granted a state securities cause of action in a situation involving no direct dealings in a firm commitment underwriting issue. Wrongful actions based on such a large–scale issue and impersonal transaction are properly redressed under the federal securities acts.

Mirrored interpretation is also improper because the scheme and express limitations of RCW 21.20.430 differ from those in § 12(2). For example, the § 12(2) statute of limitations would preclude this suit. 15 U.S.C. § 77m (1982). A government issuer such as the Supply System is not subject to suit under § 12(2); see majority opinion, at 122–24. Also, other than "sellers", Congress provided for liability only of "control persons" under § 12(2). 15 U.S.C. § 77o (1982). By contrast, other than those in privity, the Washington Legislature explicitly provided for liability of several participants in the sale: partners, directors, or employees who materially aid, for example. RCW 21.20.430(3). These differences reveal that although interpretations of § 12(2) may provide guidance, mirrored construction is patently misplaced and irresponsive to the WSSA.

Even under the federal § 12(2) standard proposed by the majority, no defendants would be liable because the complaints contain no allegations that a defendant actually negotiated a particular buy–sell transaction, or was even remotely involved with the actual sellers, the underwriters.[3] Courts adopting the substantial participation–proximate cause test espoused by the majority limit liability to those actually participating in the particular sales transaction and preclude suit against those merely involved in preparing reports and offering circulars:

> The plaintiffs here merely allege that the individual defendants participated in preparing the Registration Statement and Prospectus and certain financing mechanisms; they do not allege any substantial participation by the individual defendants in the particular sales transactions. On this ground, the court will grant the defendants' motion to dismiss the plaintiffs' § 12(2) claims against the individual defendants.

In re Diasonics Sec. Litig., 599 F. Supp. 447, 458 (N.D. Cal. 1984), *quoted in In re Victor Technologies Sec. Litig.*, [1986–1987 Transfer Binder] Blue Sky L. Rep. (CCH) ¶ 72,491 (N.D. Cal.); *see Hudson v. Capital Management Int'l, Inc.*, [1982–1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,222 (N.D. Cal.) (allegation that defendants offered opinions in sales circulars or directly disseminated information to investors is not adequate pleading of § 12(2) seller status); *Stokes v. Lokken*, 644 F.2d 779, 785 (8th Cir. 1981) (attorney's opinion letter, upon which auditor relied in issuing report for advertising materials, did not "approach the degree of participation required for liability under § 12"). For this reason, the participation test espoused by the majority is sometimes referred to as a

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[3]Indeed, the continued validity of the circuits' expansion on the plain meaning of "seller" in § 12(2) is doubtful in light of recent federal cases limiting private actions under the securities acts. *SEC v. Seaboard Corp.*, 677 F.2d 1289, 1294 nn.3 & 4 (9th Cir. 1982) (noting "the doubtful nature" of the "participant theory" espoused in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980) and cited as authority by a majority of this court, in light of recent Supreme Court cases prescribing "a strict statutory construction approach to the securities acts").

"loose privity" standard. *In re Wicat Sec. Litig.*, 600 F. Supp. 1236, 1239 (D. Utah 1984).

The complaints at bench pertain to preparation of the prospectus and annual reports, and issuance of opinion letters—activities insufficient as a matter of law to constitute the "substantial participation–proximate cause" in a particular buy–sell transaction. Indeed, a purchaser may never sue an issuer under § 12(2) in a firm commitment underwriting arrangement such as the WNP 4 and 5 bond issues; in such an instance, "even under the loosest privity standard", the proper defendant is the actual seller, the underwriter. *In re Wicat Sec. Litig.*, at 1242; *see In re Fortune Sys. Sec. Litig.*, 604 F. Supp. 150, 163 (N.D. Cal. 1984). Thus, even under the modern view of the federal "participation" approach adopted by the majority, plaintiffs' and intervenors' complaints should be dismissed.

C

Interpretations of Other State Securities Acts

My examination of interpretations of other state securities acts confirms that the Legislature intended to require privity under the WSSA. The majority determines that other courts' interpretations of state securities acts are "inconclusive" toward interpreting the WSSA. Majority opinion, at 129. On the contrary, the methodology employed by other courts provides insightful direction. As a general rule, other courts strictly construe state statutes according to their plain language. The majority unfortunately chooses to ignore this logical methodology.

State courts require the plaintiff to establish privity with the defendant to state a cause of action under acts with language similar to subsection .430(1)'s "Any person, who offers or sells a security in violation . . . is liable to the person buying the security from him or her". For example, in California the words "any person acquiring from him" require privity as a condition of recovery. *Bowden v. Robinson*, 67 Cal. App. 3d 705, 712, 136 Cal. Rptr. 871 (1977). In Oklahoma the term "any person who offers or sells" also

requires strict privity as a condition of recovery. *Nikkel v. Stifel, Nicolaus & Co.*, 542 P.2d 1305, 1307–08 (Okla. 1975). In Texas, it appears that a defendant who does anything less than negotiate the sale of stock is not a seller "liable to the person buying the security from him". *Stone v. Enstam*, 541 S.W.2d 473, 480 (Tex. Ct. App. 1976); *see also Huddleston v. Herman & MacLean*, 640 F.2d 534, 551 (5th Cir. 1981) (interpreting *Stone v. Enstam*, *supra*, as limiting state securities actions to those actions against one engaged in the sale process and never including purchases on the open market not from the defendant), *rev'd in part on other grounds in* 459 U.S. 375, 74 L. Ed. 2d 548, 103 S. Ct. 683 (1983). The court in *Anders v. Dakota Land & Dev. Co.*, 380 N.W.2d 862 (Minn. Ct. App. 1986) denied a state securities action, although it did adopt a definition of "seller" identical to a federal interpretation of § 12(2). *Anders*, at 868. A later Minnesota case, however, implicitly limits the *Anders* interpretation *by* refusing to grant an action against a defendant not the agent of a seller in privity. *Norwest Bank Hastings v. Clapp*, 394 N.W.2d 176, 178 (Minn. Ct. App. 1986). The *Norwest Bank Hastings* court determined that the seller's lender, who did not work for the seller in privity but who through his contact and advice to the buyer instrumentally influenced the decision to purchase, was not liable under the portion of the statute holding a "seller's" agent who materially aids liable. *Norwest*, at 178.

State courts expanding upon the privity approach do so pursuant to strict interpretation of statutory language that holds liable those who "participate" or "materially aid" in the fraudulent sale, unlike the WSSA language. These courts do not rely on federal circuit court trends in interpreting the federal securities acts; rather, they reasonably interpret statutory language in reaching their conclusions. *E.g., Fakhrdai v. Mason*, 72 Or. App. 681, 684, 696 P.2d 1164 (1985); *Froehlich v. Matz*, 93 Ill. App. 3d 398, 408–09, 417 N.E.2d 183 (1981). The WSSA only holds sellers in privity liable; no "participants" are subject to suit under

subsection .430(1). Hence, the majority's expansion of the WSSA liability section is clearly unsupported by other states' interpretations of their acts.

When federal courts exercising pendent jurisdiction recognize that state acts should be construed not as a mirror of federal § 12(2) but with respect to their unique purpose and language, they generally employ a plain meaning interpretation. Hence, many federal courts construing statutes similar to the WSSA interpret those acts as requiring privity, regardless of their interpretation of federal § 12(2). *E.g., SEC v. Seaboard Corp.*, 677 F.2d 1289, 1295–96 (9th Cir. 1982) (allowing suit against participants as potentially liable "sellers" under § 12(2), but precluding suit absent privity under the California State Securities Act); *In re Victor Technologies Sec. Litig.*, [1986–1987 Transfer Binder] Blue Sky L. Rep. (CCH) ¶ 72,491 (N.D. Cal.) (holding actual participants in the selling process liable under § 12(2), but requiring "strict privity" under the California State Securities Act); *see also Sharp v. Coopers & Lybrand*, 649 F.2d 175, 192 (3d Cir. 1981) (accountant who issued opinion letter used in sales program not liable under Pennsylvania Securities Act because accountant was not the actual seller), *cert. denied*, 455 U.S. 938 (1982); *Fickinger v. C.I. Planning Corp.*, 556 F. Supp. 434, 436 (E.D. Pa. 1982) (privity required under Pennsylvania Securities Act; hence advisor and parent company not liable under the act for alleged misrepresentations and omissions because they did not actually sell the security to the plaintiff). Hence, the majority's expansion of the WSSA liability section is unsupported by federal court interpretations of state securities laws.

D

Conclusion

I would interpret the WSSA to enforce its plain meaning, affording a civil action to purchasers only against the sellers from whom they purchased. This construction enforces the unique purpose of the WSSA and renders all sections

meaningful. The majority's interpretation that mirrors § 12(2) is misplaced in light of the unique purpose, language, and scheme of the WSSA.

Also, the complaints should be dismissed even under the federal test adopted by the majority. No allegation asserts that a defendant participated in a particular sales transaction to a particular plaintiff; indeed, such an allegation is impossible because the WNP 4 and 5 bonds were sold pursuant to a firm commitment underwriting arrangement. In addition, interpretations of other state securities acts should provide us with guidance: when examined, they are construed according to their plain language. A similar approach is appropriate for the WSSA.

The allegations at bench which do not assert that a defendant had any connection to the actual sellers, the underwriters, should not withstand defendants' motion to dismiss. I therefore would affirm the trial court's CR 12(b)(6) dismissal of the WSSA claims.

II

Intervenors' Negligent Misrepresentation Claim

Proper application of section 552 precludes the intervenors' negligent misrepresentation claim. I therefore dissent from that portion of the majority opinion reversing the trial court's dismissal of the negligent misrepresentation claim.

In determining whether a cause of action for negligent misrepresentation will lie, jurisdictions differ on the scope of the duty owed to the plaintiffs. The minority of courts follow the "foreseeability" approach. *See, e.g., International Mortgage Co. v. John P. Butler Accountancy Corp.*, 177 Cal. App. 3d 806, 820, 223 Cal. Rptr. 218 (1986); *Citizens State Bank v. Timm, Schmidt & Co., S.C.*, 113 Wis. 2d 376, 386, 335 N.W.2d 361 (1983). Liability under the foreseeability approach extends to all "reasonably foreseeable" plaintiffs who relied on the negligent misrepresentations. *International Mortgage*, at 820; *Citizens State Bank*, at 386.

A majority of courts, however, criticize the foreseeability

approach and follow the Restatement (Second) of Torts § 552 (1977). These courts refuse to impose liability on a limitless group of potential plaintiffs when the defendant is merely negligent. *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 596–98 (E.D. Mich. 1985).

> When there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences.

Restatement (Second) of Torts § 552, comment *a* (1977). *See also* Restatement (Second) of Torts § 552, comment *h* (1977) (persons liable under section 552 are "distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it"). Hence, liability under section 552 is limited to loss suffered "by the person or one of a *limited group* of persons *for whose benefit and guidance he intends to supply* the information or knows that the recipient intends to supply it". (Italics mine.) Restatement (Second) of Torts § 552(2)(a) (1977). This court adheres to the Restatement (Second) of Torts § 552 (1977). *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 415, 693 P.2d 697 (1985); *see also Wilber v. Western Properties*, 22 Wn. App. 458, 463, 589 P.2d 1273 (1979).

The majority correctly affirms that section 552 defines the scope of the duty owed a plaintiff in Washington who is suing for negligent misrepresentation. In my opinion, however, the court then incorrectly applies section 552 to the pleadings in this case. As a matter of law, section 552 precludes the intervenors' action for negligent misrepresentation.[4]

Section 552 precludes suit for negligent misrepresentation when the defendant merely conveys information to a

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[4]Admittedly, under illustration 6 of section 552, the situation at bench could be construed to fall within the ambit of section 552. As applied, however, no court following section 552 allows suit when information is conveyed to a limitless and unrestricted class of potential investors, as was the case at bench.

limitless and unrestricted class of investors. In such a situation, courts find a duty only if they reject section 552 and adopt the foreseeability approach. *E.g.*, *International Mortgage Co. v. John P. Butler Accountancy Corp.*, 177 Cal. App. 3d at 820 (under the section 552 approach, accountant who negligently prepared financial statements for firm was not liable to purchasers of firm's stock who relied on statements; accountants were potentially liable under the foreseeability approach); *Citizens State Bank v. Timm, Schmidt & Co., S.C.*, 113 Wis. 2d at 386 (under the section 552 approach, accountant who negligently prepared auditing statements for corporation was not liable to party who relied on statements in loaning money to corporation; accountants were liable under the foreseeability approach). Absent a known and limited number of relying parties, those courts adhering to section 552 and rejecting the foreseeability approach preclude an action altogether. *E.g.*, *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 553, 493 N.Y.S.2d 435 (1985) (accountants liable to a known relying party, but not to "any foreseeable plaintiff"); *Briggs v. Sterner*, 529 F. Supp. 1155, 1177 (S.D. Iowa 1981) (accountants not liable to foreseeable investors; court follows section 552 and refuses to hold accountants liable because plaintiff investors were not actually known and were of an unlimited class at the time the statements were prepared—"the risk to be perceived at the time of the undertaking defines the nature of the duty of ordinary care owed to third parties."); *see Milliner v. Elmer Fox & Co.*, 529 P.2d 806, 808 (Utah 1974) (accountant who prepared statements for corporation was not liable to purchasers of stock under approach similar to section 552, requiring that accountant knew that "particular" parties would rely on the report for a particular purpose, because a future purchaser of stock belongs to an unlimited class).

The majority cites one non-Washington case wherein a "foreseeable" plaintiff was allowed a cause of action under section 552. *Chubb Group of Ins. Cos. v. C.F. Murphy & Assocs.*, 656 S.W.2d 766, 774–76 (Mo. Ct. App. 1983). The

Chubb court found contractors, an architect, and a steel manufacturer liable to plaintiffs injured when a bridge that had been negligently constructed collapsed. The majority's use of *Chubb* is, however, ill suited to the case at bench. Section 552, comment *a* clearly states that the law governing the *Chubb* situation, physical injury, is not analogous to the law governing the situation at bench, monetary loss caused by negligently supplying incorrect information. Moreover, because services are crafted to meet the needs of individual clients, they cannot be likened to a product whose design and manufacture impact equally on all users. *Guy v. Liederbach*, 501 Pa. 47, 58, 459 A.2d 744 (1983). Hence, *Chubb* should not authoritatively direct application of section 552 to the intervenors' complaint.

No intervenor claims to be the beneficiary of a *particular* misrepresentation involving a transaction with a *limited* group of people. All alleged negligent misrepresentations were disseminated to the general public, and no investor received information made uniquely available for his or her benefit. Intervenors' actions for negligent misrepresentation should therefore fail under section 552, and the trial court's CR 12(b)(6) dismissal of this claim should be affirmed. I therefore dissent from the majority's holding.

In sum, I dissent because the majority improperly reverses the trial court's CR 12(b)(6) dismissal of the plaintiffs' and intervenors' WSSA claims, and of the intervenors' negligent misrepresentation claim. I concur in the majority opinion in all other respects.

DOLLIVER and ANDERSEN, JJ., concur with PEARSON, C.J.

ORDER DATED FEBURARY 17, 1988 OF THE WASHINGTON SUPREME COURT

THE SUPREME COURT OF WASHINGTON

FREDRIC HABERMAN, ET AL,
Appellants,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, ET AL,
Respondents.

No. 52559-5

ORDER CHANGING OPINION

It is hereby ordered that the opinion in the above cause, as the same appears at 109 Wn.2d 107, be changed as follows:

1. In the sixth line from the bottom of page 116, the words "and accountants" are deleted.

2. In the twenty-first line from the the top of page 117, the date "May 17, 1981," is deleted and the date "March 17, 1981," is inserted in its place.

3. In the last line of page 117, the words "all Washington" are deleted and the following words are inserted in their place: "the Washington municipal and public utility district".

Dated this 17th day of February, 1988.

/s/ Vernon R. Pearson
Chief Justice

APPROVED:

/s/ Robert F. Brachtenbach

109 Wn.2d 107

173/211

ORDER DATED FEBRUARY 19, 1988 OF THE WASHINGTON STATE SUPREME COURT

THE SUPREME COURT OF WASHINGTON

FREDRIC HABERMAN, ET AL, Appellants, v. WASHINGTON PUBLIC POWER SUPPLY SYSTEM, ET AL, Respondents.	No. 52559-5 ORDER GRANTTING MOTION FOR RECONSIDERATION WITHOUT NEW ARGUMENT

The Court having entered an order changing the opinion on February 17, 1988,

It is hereby ordered that further reconsideration is denied.

Dated this 19th day of February, 1988.

/s/ Vernon R. Pearson
Chief Justice

109 Wn.2d 107

173/210

NOTICE OF APPEAL BY APPELLANTS FREDRIC HABERMAN, ET AL.

IN THE SUPREME COURT OF WASHINGTON

FREDRIC HABERMAN, M.D., *et al.*[1]
Appellants,
and

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., *et al.*,

and

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee,
Intervenor-Appellants,

v.

No. 52559-5

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF CLALLAM COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF COWLITZ COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON; CITY OF ELLENSBURG, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF FRANKLIN COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF GRANT COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF GRAYS HARBOR COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[1]The Haberman Appellants are listed on Attachment A.

NO. 1 OF KLICKITAT COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF LEWIS COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF MASON COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF PACIFIC COUNTY, WASHINGTON; CITY OF RICHLAND, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF SKAMANIA COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON; CITY OF TACOMA, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF WAHKIAKUM COUNTY, WASHINGTON; CITY OF SEATTLE, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF FERRY COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF KITTITAS COUNTY, WASHINGTON; CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT, OREGON; CLATSKANIE PEOPLE'S UTILITY DISTRICT, OREGON; PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY, WASHINGTON; NORTHERN WASCO COUNTY PEOPLE'S UTILITY DISTRICT, OREGON; PUBLIC UTILITY DISTRICT NO. 1 OF PEND ORIELLE COUNTY, WASHINGTON; TILLAMOOK PEOPLE'S UTILITY DISTRICT, OREGON; VERA IRRIGATION DISTRICT NO. 15, WASHINGTON; CITY OF BANDON, OREGON; CITY OF BLAINE, WASHINGTON; CITY OF BONNERS FERRY, IDAHO; CITY OF BURLEY, IDAHO; CITY OF CANBY, OREGON; CITY OF CASCADE LOCKS, OREGON; CITY OF CENTRALIA, WASHINGTON; CITY OF DRAIN, OREGON; CITY OF HEYBURN, IDAHO; CITY OF IDAHO FALLS, IDAHO; TOWN OF MC CLEARY, WASHINGTON; CITY OF MC MINNVILLE, OREGON; CITY OF MILTON-FREEWATER, OREGON; CITY OF PORT ANGELES, WASHINGTON; CITY

OF RUPERT, IDAHO; CITY OF SPRINGFIELD, OREGON; TOWN OF STEITLACOOM, WASHINGTON; CITY OF SUMAS, WASHINGTON; ADLER MUTUAL LIGHT COMPANY, WASHINGTON; BENTON RURAL ELECTRIC ASSOCIATION, WASHINGTON; BIG BEND ELECTRIC COOPERATIVE, INC., WASHINGTON; BLACHLY-LANE ELECTRIC COOPERATIVE ASSOCIATION, OREGON; CENTRAL ELECTRIC COOPERATIVE, INC., OREGON; CLEARWATER POWER COMPANY, IDAHO; COLUMBIA BASIN ELECTRIC COOPERATIVE, INC., OREGON; COLUMBIA RURAL ELECTRIC ASSOCIATION, INC., OREGON; CONSUMERS POWER, INC., OREGON; COOS-CURRY ELECTRIC COOPERATIVE, INC., OREGON; DOUGLAS ELECTRIC COOPERATIVE, INC., OREGON; ELMHURST MUTUAL POWER & LIGHT COMPANY, WASHINGTON; FALL RIVER RURAL ELECTRIC COOPERATIVE, INC., IDAHO; GLACIER ELECTRIC COOPERATIVE, MONTANA; HOOD RIVER ELECTRIC COOPERATIVE, OREGON; IDAHO COUNTY LIGHT & POWER COOPERATIVE ASSOCIATION, INC., IDAHO; INLAND POWER & LIGHT COMPANY, WASHINGTON; KOOTENAI ELECTRIC COOPERATIVE, INC., IDAHO; LANE ELECTRIC COOPERATIVE, INC., OREGON; LINCOLN ELECTRIC COOPERATIVE, INC., WASHINGTON; LOST RIVER ELECTRIC COOPERATIVE, INC., IDAHO; LOWER VALLEY POWER & LIGHT, INC., WYOMING; MIDSTATE ELECTRIC COOPERATIVE, INC., OREGON; MISSOULA ELECTRIC COOPERATIE, INC., MONTANA; NESPELEM VALLEY ELECTRIC COOPERATIVE, INC., WASHINGTON; NORTHERN LIGHTS, INC., MONTANA; OHOP MUTUAL LIGHT COMPANY, WASHINGTON; OKANOGAN COUNTY ELECTRIC COOPERATIVE, INC., WASHINGTON; ORCAS POWER &

LIGHT COMPANY, WASHINGTON; PARKLAND LIGHT & WATER COMPANY, WASHINGTON; PRAIRIE POWER COOPERATIVE, INC., IDAHO; RAFT RIVER RURAL ELECTRIC COOPERATIVE, INC., IDAHO; RAVALLI COUNTY ELECTRIC COOPERATIVE, INC., MONTANA; RURAL ELECTRIC COMPANY, IDAHO; SALEM ELECTRIC, OREGON; SALMON RIVER ELECTRIC COOPERATIVE, INC., IDAHO; TANNER ELECTRIC, WASHINGTON; UMATILLA ELECTRIC COOPERATIVE ASSOCIATION, OREGON; UNITY LIGHT & POWER COMPANY, WASHINGTON; VIGILANTE ELECTRIC COOPERATIVE, INC., MONTANA; WASCO ELECTRIC COOPERATIVE, INC., WASHINGTON; WELLS RURAL ELECTRIC COMPANY, NEVADA; WEST OREGON ELECTRIC COOPERATIVE, INC., OREGON; ERNST & WHINNEY, CPA'S; BLYTH, EASTMAN, PAINE, WEBBER, INC.; DONALD C. PATTERSON, III; STANLEY T. PARDO; PAINE, WEBBER, INC.; PAINE, WEBBER, JACKSON & CURTIS, INC.; R.W. BECK & ASSOCIATES; UNITED ENGINEERS & CONSTRUCTORS, INC.; EBASCO SERVICES, INC.; WOOD & DAWSON; HOUGHTON, CLUCK, COUGHLIN & RILEY; JOHN DOE and RICHARD ROE, INC.,

Appellees,

and

CHEMICAL BANK,

Appellee in its capacity
as Bond Trustee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Appellants Fredric Haberman *et al.* (which include all those persons and firms listed in Attachment A hereto) are appealing to the United States Supreme Court from the portion of the decision and order issued in this action on October 8, 1987, as corrected by the order dated February 17, 1987, which held that RCW 21.20.430(7) (Laws of 1986, ch. 304, § 1) does not violate the United States Constitution's "impairment of contract clause", U.S. Const. art. 1, § 10, c. 1. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

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Dated: March 25, 1988

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In King County
Superior Court Clerk's Office
Mar 28,1988
Superior Court Clerk

RECEIVED
Mar 25, 1988
Clerk of
Supreme Court of
State of Washington

ATTACHMENT A

The Haberman Appellants include:

Fredric Haberman, M.D.; Claude Purvis; Nerou Cheng; Ted R. Pape; Aubrey L. Moss; John H. Biggs; Nicholas C. Dascoli; Arnold Goldberg; Frederick J. Gormley; Irving J. Gross; Rose Gross; Edward Kawash; Frank T. Kiel; Martin I. Schwartz; Kenneth C. Washburne; Jack B. Weinberger; Alice W. Wise; Lloyd W. Wise; Norma Sandison; Daniel Gelfond; Jeanne Christopher; John S. Christopher; Grace Freeman Rosen; Leo Freeman; George M. Hrunka; Charles M. Judge; The Morris County Savings Bank; Peter Madan; Peggy Ann Madan; Robert W. Madan; William A. Keyser; Marguerite E. Keyser; Marguerite E. Keyser, POA for Francis J. Herron; Merton S. Freeman; James Korsten, M.D.; Albert Baker; Barbara Jentis; Leigh E. Dunn; Rachel S. Dunn; Howard L. Ray; Daniel A. Berkoff; Albert B. Berkoff; George C. Ganzberg; Gabriel A. Calenda; Charles Zeidner; Corrine S. Corwi; Lucille Zager; Fay Freeman; Intramerica Life Insurance Company; Colonial Penn Life Insurance Company; Colonial Penn Insurance Company; Philadelphia Savings Fund Society; Regent Insurance Company; Reliance Insurance Company; Planet Insurance Company; Commonwealth Land Title Insurance Company; Criterion Insurance Company; Government Employees Insurance Company; The Broad Street National Bank of Trenton; Ronald Klinger; Robert Luban; Harleysville Mutual Insurance Company; Pennbank/Erie, formerly Security Peoples Trust Company; General Accident Insurance Company; Pennsylvania General Insurance Company; Camden Fire Insurance Association; Potomac Insurance Company of Illinois; Farmers State Savings Bank; Carson L. Shade; Mercantile National Bank of Indiana; David Fishe, M.D.; Albert W. Thompson, M.D.; Jack Schaefer; Robert L. Mast; Loretta Steinbach; Robert N. Wright; Jacob Malit; Doris Malit; Al Groschen; Mar-

vin Neben; Shirley Nebern; William C. Starrett, II; Arthur Brown; Arthur Brown, Trustee for 1979 Ethel Glazer Trust; Saul M. Ferman; Jack A. Schaps; Leon Fein; Lawrence W. Pendelton; Imon R. Gammage; Lucy E. Gammage; Dave Rosenthal; Bernie Rosenthal; NCNB Bancorporation, Inc.; Philadelphia National Bank; Albert M. Grathwol and John D. Grathwol, Trustees of the Mr. & Mrs. Albert M. Grathwol Trust of 1981; Kira Fomenko; Abraham G. Luboff; Deborah R. Luboff; William D. Cane; Wemple State Bank; Brown County State Bank; Charles F. Deater; Albert Caponetto; Harold B. Hogle; G. Ralph Bartolme, Esq.; B.M. Behrends Bank; George Tomasini; Albert R. Cox; Norman L.Kaufman and Lillian Kaufman; Herbert L. Press; Coronado Bank; Cielo Vista Bank; Suburban Trust & Savings Bank; Farm Bureau Mutual Insurance Company of Michigan: J. Corlas Cole; Herbert Eckerling; Perrin H. Eckerling; Morrison Rutherford, M.D.; Central National Insurance Company of Omaha; William Randall Dawson; American Family Life Assurance Company of Columbus; Rockwood Insurance Company; SouthTrust Bank of Alabama, N.A.; SouthTrust Bank of Marion County; SouthTrust Bank of Selma; SouthTrust Bank of Sand Mountain; SouthTrust Bank of Dothan; SouthTrust Bank of Baldwin County; SouthTrust Bank of Calhoun County; SouthTrust Bank of Etowah County; SouthTrust Bank of Huntsville; SouthTrust Bank of Mobile; Bank of Heflin; Mutual Service Casualty Insurance Company; Pennsylvania National Mutual Casualty Insurance Company; 1st Source Bank; Provident Alliance Life Insurance Company; Balboa Insurance Company; Henry L. Pohndorf; Modern Service Insurance Company; Dr. Wally Teuscher; Frank D. DeVol; Samuel Lavine Trust; Rose Lavine Trusty; Prudential Reinsurance Company; Prudential Property & Casualty Insurance Company; Progressive Casualty Insurance Company; North Carolina Farm Mutual Insurance Company; J. Bruce Forbes; Milton & Charlotte Forbes; Joel

M. Davis; Ron Nelson; Charles M. Schulz; Edward P. Swain, Jr.; W.I. Osborne; Johanna Budman; Christine A. Simon; Peter Van Halen; Glenn R. Lawrence; Ernest E. Elmore; June T. Shepherd; Vincent De Sciose; Empire Fire & Marine Insurance Company; American States Insurance Company; American Economy Insurance Company; The Lincoln National Life Insurance Company; Insurance Company of Illinois; Chicago Title Insurance Company; Peter M. Jordan; Neale Onstot; Esther Kaplan; Phyllis B. Zasloff; Patsy Riccardello; Myron Erdmann; Edythe Erdmann; Leo S. Guthman; Charles W. Mullenix; Margaret R. Just; Marshall S. Salkiln, M.D.; Paul Doll, Trustee for Audrey B. Love; Wausau Insurance Companies; Employers Insurance of Wausau; Wausau Underwriters Insurance; Robert M. Carlton, M.D.; The Hanover Insurance Co.; Citizens Insurance Co. of America; SteinRoe Tax Exempt Bond Fund; Bernadice A. Rischoff; Shirley M. Elliott; Robert N. Mayer; Dr. Raymond M. Chaitin; Sydney Vender; First Fidelity Bank; Robert Kunst; Milton Greenfield, Jr.; Catherine C. Swartchild as Trustee for James Swartchild UAD 10/25/62; Rose Kunst; Jack H. Irving; Florence Irving; David Bachner; Rita Bachner; George L. Kroll as Trustee for George L. Kroll Trust UAD 12/5/72; Michael Cudahy; Elizabeth Stein as Trustee of Living Trust; Jeanette S. Elliott as Trustee for Jeanette S. Elliott Trust; Helen F. Culver; Philip J. James; Edward S. Tishman, Trustee U/A 12/18/72, f/b/o Andrew P. Tishman; Edward S. Tishman, Trustee U/A 1/20/82, f/b/o Andrew P. Tishman; Edward S. Tishman, Trustee U/A 2/28/79, f/b/o Leslie Tishman; Lelan H. Menke; June R. Menke; Beatrice T. Kester; Michael Mullins; Maryea Mullins; Frank Williams; Bea Tanne Morris; James M. Maul; Beverly W. Maul; Max W. Strauss; John Farnam; Robert G. Farnam; Franklin W. Farnam; Edward Jacks; Jonathan S. Powell; John Verry; Jack Jay; A. Linc Lancet; Peoples National Bank of Washington, Executor for the Estate of John H. Sellen,

Deceased; W.J. Thomas Ferguson, Executor for the Estates of Mary Violet and William H. Ferguson, Executor for the Estates of Mary Violet and William H. Ferguson, Deceased; William B. Moroe; John R. Janet; Louise Shapiro; Robert J. Anderson; Barnet M. Daniels; Blanche Daniels; Merlin C. Perkins; Anthony Riccardello; William Hauptman; Dr. Alfred J. Cinelli; Union Safe Deposit Bank; Union Bank & Trust Company, N.A.; Gayle M. Schubach, trustee for Judy Radcliffe; Gayle M. Schubach, trustee for Henry Schubach; Gertrude Schwartz; Barnett Banks Trust Company, N.A., in various fiduciary and/or agency capacities; W.T. Cummins; Midlantic National Bank; Midlantic National Bank/North; Joe Aggio; Rosalia Aggio; Florence Elliott; Florence Savin, Trustee for Madeline Hecht; Karl B. Kluge; Geraldine V. Kluge; Edward D. Meigs Trust UDT dated 7/8/82; United Jersey Banks; Audobon Indemnity Company; United Guaranty Corporation; Garth Living Trust; Saul Haimowitz; Ruth Haimowitz; Westmount Properties; Saul Haimowitz, Inc., Employees Retirement Trust Fund; Textile Financial Corp., Robert F. McNulty; Fred R. Jueneman or Rodney W. Jueneman, Co-trustees UAD 9/14/77; Yale M. Leavy; Edwin L. Garthwaite; Arthur Hargrave; Euguene E. Koubeck; Richard L. Bakman; Lois Gregory; James P. Devere; Richard F. Hamilton; Jean Needham; William P. Allen; Helene P. Allen; Edward C. Forsyth; Ed Daniels; Richard Fuchslin; Helen Taylor; Worldwide Underwriters Insurance Company; E. Nicholas Argent, M.D.

CERTIFICATE OF SERVICE

The undersigned counsel for Appellants Fredric Haberman, *et al.*, certifies that on March 25, 1988, he deposited in a United States post office or mailbox the foregoing notice of appeal addressed to the following counsel of record:

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/s/ Scott R. Tucker
Scott R. Tucker

MEMORANDUM DATED MARCH 7, 1985 BY WASHINGTON STATE DEPARTMENT OF LICENSING

STATE OF WASHINGTON
DEPARTMENT OF LICENSING

Highways-Licenses Building * Olympia, Washington 98504 * (206) 753-6918

MEMORANDUM

DATE: March 7, 1985
TO: Theresa Anna Ara
FROM: Jack L. Beyers
RE: Substitute Senate Bill 4114

The senate bill amends the private, civil liabilities section of the Securities Act of Washington, Chapter 21.20 RCW. The amendment changes subsection (7) of RCW 21.20.430 to read as follows:

> (7) Notwithstanding subsections (1) through (6) of this section, if an initial offer of sale of securities *which are exempt from registration under RCW 21.20.310 is made* by the state or its agencies, *political subdivisions, municipal corporations, or other instrumentality of one or more of the foregoing and* is in violation of RCW 21.20.010(2), *each such issuer,* each member of the governing body, *committee member, public officer, director, employee, or agent of such issuer acting on its behalf,* or *each* person in control of ((the ~~state or agency~~)) *such issuer and* each *member of the governing body,* committee member, public officer, ((~~or~~)) director *employee or agent of such person* acting on its behalf, ((~~and each employee thereof~~)) who materially aids the offer or sale, are liable to the purchaser of the security only if the purchaser establishes scienter on the part of the defendant.

A number of isues are raised by the proposed amendment.

BACKGROUND

Subsection (7) of PCW 21.20.430 was inserted in the 1981 legislative session. The purpose of this additon was to create a higher standard of liability — based on scienter — for public officers and employees carrying out their duties with state agencies. Essentially "scienter"[1] requires intent to deceive.

The sponsoring agency in the 1981 session was the Washington Health Care Facilities Authority. The arguments were that the agency should be liable under the existing standard of proof, but that the public officers and employees should only be liable if the purchaser of a security could establish in a court action the specific intent to violate the law (scienter). Subsection (7) did not in any way change the basis for liability of political subdivisions or municipal corporations nor the liability of the underwriters or agents acting for such state agencies or political subdivisions or municipal corporations.

THE AMENDMENT

The amendment raises the standard of proof in any securities fraud action brought by private litigants against state and other government agencies. The higher standard of proof is not only extended to the public officers and their employees of political subdivisions and municipal corporations, but also to the agency or government body issuing the security. In addi-

[1]In a 1976 case involving civil claim by investors against an accounting firm for violation of the federal securities antifraud rule, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), the United States Supreme Court defined scienter as "a mental state embracing intent to deceive, manipulation, or defraud." The Court decided in that case that scienter must be alleged in actions brought under the federal securities antifraud role, Rule 10b-5. In 1980, the Supreme Court of Washigton, in the *Kittilson v. Ford*, 93 Wn. 2d 223, 608 P.2d 264 (1980) case, decided that, despite the *Hochfelder* case, scienter was not required for civil actions brought under the antifraud provision of the Securities Act of Washington, RCW 21.20.010.

tion, the amendment can also be read to include the agents of such government bodies which could include the underwriters, the dealers in the underwriting syndicate and broker-dealers and salesmen selling the government bonds. This interpretation of the amendment has far-reaching effects well beyond the policy of the 1981 legislative amendment of protecting public officers and employees in carrying out their duties in a bond offering. No specific policy is set forth on the face of proposed substitute Senate Bill 4114 which explains the reason for this far-reaching amendment of subsection (7).

PROTECTION OF INVESTORS

The amendment may be detrimental to the interests of investors in state bond offerings. Investors who might have to sue or threaten to sue a state agency or other governmental body subject to this amendment would have to prove "scienter" on thepart of the governmental body in order to make any recovery or gain any settlement. This would make it much more difficult for investors to recover losses in a securities fraud action against a Washington governmental or quasi-governmental body.

IMPACT ON EXISTING LITIGATION

There seems little question that the legislature can repeal or change causes of action so as to affect pending litigation. In 1970, in the *Sparkman & McLean v. Govan Investment Trust* 78 Wn. 2d 584, 478 P.2d 232 (1970) the Supreme Court of Washington stated (quoting two earlier cases): "Where a tort action can be ***brought only by virtue of a statute***, there can be no vested right therein, and the legislature may take away the right at any time." (emphasis in the original). As recently as 1976, the *Haddenham v. State*, 87 Wn. 2d 145, 550 P.2d 9 (1976), the Supreme Court of Washington said:

> The abolition by the legislature of an accrued cause of action based on statute does not violate any con-

> stiutional rights of plaintiff because of tort cause of action is not vested until it is reduced to judgment. (citations omitted).

Thus, the legislature could cause the change contained in Bill 4114 to apply to pending cases, incuding the WPPSS litigation. However, the amendment to (7) is silent on its application to existing litigation and causes of action.

The general rule of statutory construction is that statutes are presumed to be prospective only. There is an exception to this rule, however, for statutes that concern procedures or remedies. Such statutes are presumed to be intended to apply to retroactively. ***Agency Budget Corp.v. Washington Ins. Guaranty Assn.***, 93 Wash 2d 416, 610 P.2d 361 (1980). It seems likely that the change embodied in Bill 4114 would be interpreted to have retroactive effect.

WPPSS LITIGATION

The issue with regard to the application of (7) on pending litigation is very important with regard to the pending law suits against WPPSS. The bond holders have brought a class action against WPPSS and have included not only federal securities laws fraud claims but also securities fraud claims under our Washington act. These are private civil actions brought, in part, under the express provisions of RCW 21.20.430. Subsection (7) is directly relevant to the WPPSS claim. Presently, the entire class of WPPSS plaintiffs have benefitted from a ruling of the court that the Washington Securities Act will apply to their claims for relief against WPPSS. Under the Washington act, scienter need not now be proved in these claims.

The impact on the amendment under the bill is to raise the standard of proof to scienter, thereby making it more difficult

for the WPPSS plaintiffs to recover against WPPSS as an issuer, its officials and employees, the underwriters handling the distribution of the WPPSS bonds and the dealers in the underwriting syndicate and the brokers and salesmen selling the WPPSS bonds. The amendment could be interpreted to require the plaintiff to prove scienter against each of these distinct parties in the WPPSS litigation. The character of the suit is such that Subsection (7) could change the ability of the plaintiffs to make any recovery against either certain parties in the litigation or possibly any of them at all. Thus, the amendment could have a substantial impact upon the litigation whether the defenses created by the amendment of subsection (7) are upheld by the courts or not.

BOND RATING

The amendment could also have an effect upon the bond rating of future sales of bonds by the state, its agencies, its political subdivisions and municipal corporations. The bond ratings are based on many criteria relating to the risks to bond holders. Changing the elements of proof under the Securities Act for suing bond holders may result in change in bond ratings. It is possible that this statutory change, and its effect on the WPPSS litigation, could create a climate in which the bond rating services will lower the ratings for the bonds of this state. This could cost tax payers millions of dollars in extra interest payments.

MES:SES:da

FEBRUARY 16, 1986 - WASHINGTON STATE SENATE FLOOR PROCEEDINGS

The Washington State Senate
OLYMPIA

March 6, 1986

TO WHOM IT MAY CONCERN:

The attached computer printout is a true and correct copy of the February 16, 1986 Senate floor proceedings on Engrossed Substitute Senate Bill No. 3990.

SID SNYDER
Secretary of the Senate

SECOND READING

SENATE BILL NO. 3990, by Senator Moore
Relating to securities.

MOTIONS

On motion of Senator Moore, Sustitute Senate Bill No. 3990 was substituted for Senate Bill No. 3990 and the substitute bill was placed on second reading and read the second time.

Senator Bottiger moved that the following amendment by Senators Bottiger and Vognild be adopted:

(@ba— Begin Amendment Text — 7 PT/9 BL)

Strike everything after the enacting clause and insert the following:

"Sec. 1. Section 43, chapter 282, Laws of 1959 as last amended by section 1, chapter 171, Laws of 1985 and RCW 21.20.430 are each amended to read as follows:

(1) Any person, who offers or sells a security in violation of any provisions of RCW 21.20.010 or 21.20.140 through 21.20.230, is liable to the person buying the security from him or her, who may sue either at law or inequity to recover the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longers owns the security. Damages are the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition.

(2) Any person who buys a security in violation of the provisions of RCW 21.20.010 is liable to the person selling the security to him or her, who may sue either at law or in equity to recover the security, together with any income received on the security, upon tender of the consideration received, costs, and reasonable attorneys' fees, or if the security cannot be recovered, for damages. Damages are the value of the security when the buyer disposed of it, and any income received on the security, less the consideration received for the security, plus interest at eight percent per annum from the date of disposition, costs, and reasonable attorneys' fees.

(3) Every person who directly or indirectly controls a seller or buyer liable under subsection (1) or (2) above, every partner, officer, director or person who occupies a similar status or performs a similar function of such seller or buyer, every employee of such a seller or buyer who materially aids in the transaction, and every broker-dealer, salesperson, or person exempt under the provisions of RCW 21.20.040 who materially aids in the transaction is also liable jointly and severally with and to the same extent as the seller or buyer, unless such person sustains the burden of proof that he or she did not

know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(4)(a) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

(b) No person may sue under this section more than three years after the contract of sale for any violation of the provisions of RCW 21.20.140 through 21.20.230, or more than three years after a violation of the provisions of RCW 21.20.010, either was discovered by such person or would have been discovered by him or her in the exercise of reasonable care. No person may sue under this section if the buyer or seller receives a written rescission offer, which has been passed upon by the director before suit and at a time when he or she owned the security, to refund the consideration paid together with interest at eight percent per annum from the date of payment, less the amount of any income received on the security in the case of a buyer, or plus the amount of income received on the security in the case of a seller.

(5) No person who has made or engaged in the performance of any contract in violation of any provision of this chapter or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract. Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this chapter or any rule or order hereunder is void.

(6) Any tender specified in this section may be made at any time before entry of judgment.

(7) Notwithstanding subsections (1) through (6) of this section, if an initial offer or sale of securities that are exempt from registration under RCW 21.20.310 is made by this state or its agencies, political subdivisions, municipal or quasi-municipal corporations, or other instrumentality of one or more of the foregoing and is in violation of RCW 21.20.010(2), and any such issuer, member of the governing body, committee member, public officer, director, employee, agent of such issuer acting on its behalf, or person in control of such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such person acting on its behalf, materially aids in the offer or sale, such person is liable to the purchaser of the security only if the purchaser establishes scienter on the part of the defendant. The word "employee" or the word "agent," as such words are used in this subsection, do not include a bond counsel or an underwriter. Under no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters. *The provisions of this subsection are retroactive and apply to any action commenced but not final before July 27, 185. In addition, the provisions of this subsection apply to any action commenced on or after July 27, 1985.*

NEW SECTION. Sec. 2. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected."

(8 PT)

REMARKS BY SENATOR BOTTIGER

Senator Bottiger: "Mr. President, the difference between the substitute bill and the amendment, which strikes the substitute bill and substitutes a new substitute bill, is that the amendment makes it clear that the action does not apply to

bond counsel or underwriters. You can argue as to whether the substitute bill did or did not, but the amendment makes it absolutely clear that all we are talking about is the elected officials of cities, PUD districts, mutuals, co-ops and all the rest of the electrical community. For that reason, I urge your approval of the amendment to the substitute bill.

POINT OF INQUIRY

Senator Newhouse: "Are you saying, Senator Bottiger, that you do not believe that bond counsel and securities people must have a higher degree of responsibility than the public officials need?"

Senator Bottiger: "Sir, I would never approve of or support or knowingly vote for any bill that applied any standard of care to attorneys other than negligence. An attorney, if he is negligent, should pay and because the question is whether the substitute bill exempted out the bond counsel, I offer an amendment to make it absolutely clear that their help is a standard of care and negligence."

POINT OF INQUIRY

Senator Talmadge: "Would Senator Bottiger yield to one further question?

"Senator, following up on Senator Newhouse's question and in a similar vein, if this measure comes back from the House of Representatives with any changes in its present provisions that would expand the extent to which a scienter was applied to various categories of individuals, what would your action be?"

Senator Bottiger: "I would oppose the bill and do everything I could to kill it."

POINT OF INQUIRY

Senator Moore: "Mr. President, I would like to ask Senator Bottiger a question. Would you yield?

"Senator Bottiger, an 'aye' vote on this amendment helps who?"

Senator Bottiger: "I would guess the rate payers, and the elected officials of aii of the city lights who are in the electrical generation business, the rate payers and elected officials of all the PUD's, the boards of directors of all the mutual co-op REA's — rural electrification organizations. It applies the standard of care of scienter, which was the applicable standard of care prior to a court decision in 1980. It returns the standard of care to those people that existed in 1980 and which we thought we fixed in 1985."

Senator Moore: "Thank you."

FURTHER REMARKS BY SENATOR MOORE

Senator Moore: "It seems illogical to me that we want to grant special privileges to public officals as opposed to private officials. I must say that I was unaware of this situation until about 1:00 on the cut-off day when people who wanted this legislation came to me and said that they were pleading for me to find the title only — that they could use for this purpose. Well, I opposed what they were doing, but in a spirit of fair play and wanting the entire body to have an opportunity to vote on such an important issue, I granted this. I still oppose it. I think it is discriminatory and I shall vote against it."

REMARKS BY SENATOR GARRETT

Senator Garret: "Thank you, Mr. President and members of the Senate. You know, that's exactly the way that I feel. This is the way we got into this whole WPPSS thing — by

rush and sneak and easing things around. We debated here a long time yesterday about the tort liability and where people had been wronged and caps and all of those things. Now here we have where people with competent bond counsel or legal advice — or at least they paid enough for it — and they defrauded people all over this whole nation . Now I don't know — part of my district runs up along towards Seattle — you know along Lake Washington, and I would have to confess that all contact that I have had from anybody in the district or some of those people, who apparently from where they live, probably have a little money, but every one of them who has called me and talked abut this are WPPSS bondholders and they are not the ones that bought the 15 percent bonds — the last ones that they sold which, you know, they weren't going to pay for them, so they didn't care what the interest rate was, but they are very concerned and they're asking me not to vote on any legislation that would deprive them of the money that they had invested for their retirement — for the the rest of their lives.

"I don't see how that we could have here — and especially on a Sunday afternoon after Senator Zimmerman's very fine prayer — how we could be considering a piece of legislation that would allow people to get away with fraud and with taking the money and make it retroactive. You know, I just don't see how we could do or consider such a thing as that. So I hope that we would just vote down this amendment and the whole thing."

REMARKS BY SENATOR GUESS

Senator Guess: "Mr. President, I remember so clearly the 1975 session when a lobbyist by the name of Mr. Billington came down here and sold us a bill of goods as no other super salesman selling soap could do. I'm ashamed to say it — ad-

mit it — but I bought his story — hook, line and sinker and I have regretted it ever since. That bill that gave them almost unlimited authority on change orders and contracts was the thing that set the stage for the 2.29 billion dollar bust that we have suffered in the state of Washington. If we were now to vote for this bill, we would only be compounding the felony. I beg of you, my fellow colleagues, to seriously consider what you would be doing for voting for 3990."

REMARKS BY SENATOR RASMUSSEN

Senator Rasmussen: "Mr. President, speaking in favor of the amendment or the substitute to the substitute, I think it is needed. I can understand Senator Moore's reluctance and I can understand Senator Guess, but without this you don't have any point of start. It goes on for years and years. Now, Senator Garrett, WPPSS I, II and III are good - WPPSS IV and V, where the biggest bond houses in the country, say if we would have had another sixty days we would have gotten rid of the rest of them. Some of the dealers are still holding a few of them, but in the case that you had a lot of innocent people out there — Senator Guess you remember Don Hodel — he was head of the Bonneville — that's the fellow that just fired Lee Iacoccoa after he raised all the money, but he said that they were going to turn the lights out — that we weren't going to be able to cook our coffee or fry our eggs — that there wasn't going to be any power. I think he may have had something to do with Arabs that said that there won't be any oil either — it's coming out of their ears now.

"This is needed, because there were a lot of people, a lot of elected officials and PUD's and so forth that actually hadn't had very much experience and they were rushed into it and they need some protection. Of course, if they want to come back and sue us — the Legislature — that would be something

else again. They probably should, but I don't think they will. However, I think this is needed and I urge your support."

POINT OF INQUIRY

Senator Bailey: "Thank you, Mr. President. Would Senator Bottiger yield to a question, please?"

"Senator Bottiger, there was a suggestion here that scienter meant fraud. Now, I'm just a dairy farmer, but that isn't my understanding of the term that we're trying to protect the board of directors of the PUD's."

Senator Bottiger: "Senator, the law is encumbered by the use of some old Greek and Latin and English words. Scienter is an evil mind and it comes out of the criminal statute and I guess you'd have to say it is in the fraud classification of words as to what we're trying to describe the person was thinking when he did an act."

Senator Bailey: "However, under your amendment to the amendment, are we trying to protect the PUD boards from fraud? I guess that is my real question."

Senator Bottiger: "Senator, what happens is the PUD's vote to authorize some bonds, then the underwriters and bond counsels prepare a prospectus. They are traditionally thought of as agents of the board and of the PUD. They are responsible, and in my opinion, I think it clearly says 'to a negligent standard.' If they do that in a negligent way, people rely on it and buy the bonds, they're liable, but is the board that simply hired them liable? The answer is, as you and I know, we are held unless we in an evil mind decide to do this, we are not personally liable. That's been the standard in this state for a long, long time. In 1980, a court — in a bad set of facts — came along and changed it. We immediately changed it back. The question is, is it retroactive? We thought it was; a state

court said that it was. A federal court said, 'Well, it isn't clear,' and I'm going to let the legislature express its opinion as to whether they meant it to be clear.

"Most of these bonds were sold before 1980, when we all thought the standard of care was scienter on part of the elected officials, but negligence on the part of their employees and contractors."

Senator Bailey: "So this merely puts it back to the way other employees of the state of Washington were? Thank you."

FURTHER REMARKS BY SENATOR BAILEY

Senator Bailey: "Mr. President, I support this amendment. I hope others do."

The President declared the question before the Senate to be adoption of the amendment by Senators Bottiger and Vognild.

Senator Bottiger demanded a roll call and the demand was sustained.

REMARKS BY SENTOR VOGNILD

Senator Vognild: "Thank you, Mr. President. Before this vote, if I can clarify something that I believe, at least, is correct. We have been debating the bill and that is fine and just and we should, but the amendment is what we are voting on. The amendment is meant to narrow the scope of the bill. Those of you who actually oppose the bill, I would suggest, probably would vote for the amendment, because it narrows the scope of the bill."

REMARKS BY SENATOR HAYNER

Senator Hayner: "I believe that it is also true that it sets up a different standard for people involved in this — a different

standard with respect to bond counsel and underwriters than, for example, PUD commissioners."

The President declared the question before the Senate to be the roll call on adoption of the amendment by Senators Bottiger and Vognild.

ROLL CALL

The Secretary called the roll and the motion by Senator Bottiger carried and the amendment was adopted by the following vote: Yeas, 34; Nays, 13; excused, 2.

Voting yea: Senators Bailey, Barr, Bauer, Bender, Benitz, Bottiger, Conner, Craswell, DeJarnatt, Fleming, Gaspard, Goltz, Granlund W., Halsan, Hansen, Johnson, Kreidler, Lee McDermott, McManus, Metcalf, Moore, Owen, Peterson, Rasmussen, Rinehart, Sellar, Stratton, Talmadge, Thompson, Vognild, Warnke, Williams, Wojahn — 34.

Voting nay: Senators Bluechel, Cantu, Deccio, Garrett, Guess, Hayner, Kiskaddon, McCaslin, McDonald, Newhouse, Pullen, Saling, Zimmerman - 13.

Excused: Senators Patterson, von Reichbauer -2.

MOTION

On motion of Senator Moore, Engrossed Substitute Senate Bill No. 3990 was advanced to third reading, the second reading considered the third, and the bill was placed on final passage.

REMARKS BY SENATOR BOTTIGER

Senator Bottiger: "Mr. President and members of the Senate. The only thing that wasn't said on the original debate is that the rate payers are really the people that are affected by this bill. I wouldn't want anybody to think that the county

commissioners or the city council of the city of Tacoma or Seattle or whatever are the ones that we are talking about. What we are talking about are the rate payers of the PUD's and the municipals and the co-ops all over this state. When their board voted to issue a bond, there was nothing wrong with the conduct in doing so. When they instructed their underwriters and bond counsel to prepare this prospectus, there was nothing wrong in doing so — just like we do every session when we order or authorize the issuance of a capital bond budget. We do not individually go and check everything that is said about those bond statements. The action brought, and pending in court, by the bondholders alleging that they were mislead by the bond statements and the prospectuses that were issued by the underwriters should not be passed through. If they are successful, it should not be passed through to the rate payers on the theory of agency. So the vote here is, in my opinion, shall the underwriting firm that handled that bond issue and their bond counsels pay the bondholders, or shall the rate payers — the people of the state of Washington. This bill says not the rate payers."

POINT OF INQUIRY

Senator Hayner: "Senator Bottiger, would you yield to a question, please?

"This bill is retroactive. The one we passed last year, which we are now trying to correct, did not have any language about retroactivity in it and I voted for that bill, but I do not remember, and I did have the staff check, if there was any information on the floor at that time about the retroactivity of this bill.

"Now, is this bill, with its retroactive provision, intended to affect the rights in a specific law suit which is now before the courts?"

Senator Bottiger: "Senator Hayner, it's intended to affect the standard of care required by the elected boards and county councils of the utilities of the state of Washington in the period discussed directly in the amendment. I recall that a judge retroactively changed the standard of care. It had always been scienter and in 1980 he said, 'No, it's negligence retroactively.' Now, he can do that because in this area of law, there is retroactivity and not — depending on the kind of issue you're dealing with. It was presumed that it was retroactive, at least in my mind, because we are not dealing with a property right. We were dealing with a standard of care to be applied to people, and that is traditionally retroactive.

"Just like the tort bill you passed yesterday, that's retroactive untill all of the people who have been hurt, but haven't filed their lawsuits yet. Every one of those people who are out there — young babies that have just been born, that's all retroactive, and so this bill is also retroactive. The state judge said, 'You're right; that's the standard in this state.' A federal jduge said, 'I want the legislature to make it more clear.' That's all we're doing."

FURTHER REMARKS BY SENATOR HAYNER

Senator Hayner: "Mr. President, may I proceed? There are many cases in the courts now dealing with the issue of who is responsible in the Washington Public Power Supply System debacle. What we are doing here is changing the playing field which existed at the time that some of those contracts were made — some of those actions which were taken which might be negligent and it appears to me that to do that now is totally unfair.

"Yes, we can do it. I don't doubt that we can do it, but it seems to me in all fairness that is not the way to deal with people. Now you can talk about rate payers all you want, but

there are a lot of bondholders too that happen to be widows, orphans; there are pension funds that hold WPPSS bonds. There are all kinds of people out there — 3,000 of them and I think at this point, it is only fair to leave it up to the courts to decide which of those people are responsible."

REMARKS BY SENATOR FLEMING

Senator Fleming: "Mr. President and members of the body. I'm going to support this measure and I am going to support it with some reluctance. I am not going to try to get into debate of the standard of care. I am not going to try to get into debate of the issuing of the bonds and whether the bondholders had some great risk, because those people who purchased those bonds knew they were taking some risk when they bought those bonds. Now, what the extent of the risk, I am not going to debate that. Whenever you get involved in that type of thing, unless you have some real safe type of investment, there is some level of risk.

"I am going to do this in terms of other rate payers, that we should do this. I am not as concerned, unfortunately, with those public officials, per se. There are a lot of us here on this floor — not maybe a lot of us on this floor, but a lot of us that were either in the House or Senate when this thing came about — that didn't feel as though they should have been doing that in the first place. A lot of those elected officials and boards of directors thumbed their nose at us and told us we knew where to go. Now they're back here asking us to help them, so I don't feel any real sorrow for them.

"I think if we don't do something like this, that ultimately we are going to affect the rate payers and it is under those circumstances that I am going to vote on this measure. I think that we might even have to begin to look at it — and I know

it's going aginst the grain because I am one of those great local control people and local charters and that type of thing there, but these organizations do have broad sweeping powers and they do have the tendency to thumb their nose at us, but when they get into trouble they don't hesitate to come to us for some support. I am going to support the measure, but I am doing it with some reluctance."

REMARKS BY SENATOR ZIMMERMAN

Senator Zimmerman: "Mr. President and members of the Senate. Occasionally, we need to look at things from the standpoint of what's right and not necessarily how many people we're going to help or hurt. In this case, it is a matter that the court made a decision that now got us sort of where we are and the court, perhaps, made a mistake in terms of what they did a couple of years ago in '83 — the actual court decision that has somewhat been a factor in complicating this whole subject. Now, obviously, there are a lot of rate payers that will be helped as far as what has been said this afternoon.

"At the same time, in the state of Washington, today, we still — despite all the problems — we've got the lowest power rate in the country. Grant County is the lowest in the state. Our county PUD of which we have recently had a rebate for rate payers, just suggested that they had enough money that they turned it back with the idea that we give to the PUD for other purposes. I have three PUD counties. Obviously, there are a lot of people in my district that are going to be helped — the PUD's commissioners are going to be helped. I think that the point is that that's not what we should be doing in this case, because we should be trying to stay with the contract that originally had been set up and with the original facts that those bondholders had certain rights that also should be protected in terms of contractual rights. In this case, we are trying to change the ball game.

"I think where there is popularity, and while the votes and while all the numbers are out there on the basis of voting for this measure, it is the wrong way to vote and I think for once you should, perhaps, take a look at the situation and vote for what you think is right — and in this case, I think that's a vote 'no.' "

REMARKS BY SENATOR TALMADGE

Senator Talmadge: "Thank you, Mr. President and members of the Senate. As chairman of the Judiciary Committee, it's, I think, my responsibility to be certain that we shouldn't be using the Legislature as the appellate court when somebody disagrees with the outcome of the decision of the trial court in our state — be it a state court or federal court. I voted against the People's leasing bill several years ago for that very reason, although I think it passed with flying colors and had a lot of support from some of the people who are now so concerned about this issue.

"I think consistency dictates that you oppose the use of the Legislature as the ultimate appellate court for any disagreement with what happens in our state's court system, but at the same time I can't help but feel that some of the statements made out here like some of the people who last night made such outstanding pronouncements on the issues relating to victims — less of a concern about injured people and more of a concern about protection of a financial interest — makes it a little bit difficult for me to stomach this vote. Nevertheless, I think, in order to preserve the process that we have in the Legislature and the protection of the sanctity of the legal system to avoid having the Legislature being the ultimate appeals court for every single disagreement of every single issue that there is, I intent to vote 'no' on the bill. I hope that some of the pronouncements that were made in brave support of financial interests will now carry over when we deal with the

issue of personal injuries and the people who are hurt, as opposed to money."

REMARKS BY SENATOR GOLTZ

Senator Goltz: "Mr. President and members of the Senate. Senator Zimmerman kind of confused me and so I went over to my coach and asked what the facts are in the case and what I surmised before and what I surmise now is that the rules of the game under which everyone was playing at the time when those bonds were sold were the rules of the first half. The judge came in at halftime and said the rules for the second half are going to be different from what we played in the first half and we are back here now reestablishing the rules for the second half of the game. The same rules that were in for the first half will be the rules that we play under for the second half, and the judge made a mistake when he came in to the locker room and told us that the rules were going to be different. That's the way I understand this, so that's why I am going to vote for the bill."

REMARKS BY SENATOR GARRETT

Senator Garrett: "Thank you, Mr. President and members of the Senate. You know how we got into this mess was that the PUD association came down here and asked the Legislature to creat a JOA — Joint Operating Agency. Now any PUD district in the state could have gone ahead and done this on their own, but they got the Legislature to create this association thing and so then they started doing what they did. Now this is the way the people in other states and from everywhere look at this thing. Then after they got all the money, they went down to the supreme court and got the whole thing declared unconstitutional, so they could keep the money.

"There was one thing in this scheme that they overlooked and that was maintaining the responsibility. Now, they're down here and they want us to do this retroactively — and you know — I'm shocked that our leadership is saying that the reason we want to do this is because of the ratepayers in the state of Washington. In other words, we are wanting to help to confiscate this money because it may raise electrical rates in the state — and we are admitting — we are saying that is why we want to do it. I don't think that's fair. I don't think that it's proper to do it that way and I am not so sure that it's going to help the rate payers. When the people who buy bonds see how we operate and how we will retroactively take somebody off of the hook, I'm not so sure that it won't affect our bond rating and that everybody in the state of Washington will be paying for it. I feel for the rate payers as well as anyone else, but I don't think that we should be voting to confiscate all of this money all over the United States to use it to keep our power rates lower. If we are doing that, I don't think we should admit it."

REMARKS BY SENATOR VOGNILD

Senator Vognild: "Thank you, Mr. President. I rise in support of this bill and I guess I differ with my friend, the chairman of the Judicial Committee. Roughly ten days ago, I had no idea what scienter was — never heard of it. We take some crash courses around here. I believe that it is in the function of this body of the Legislature to correct things that are wrong and I believe that the change of rules that Senator Goltz talked about are, in fact, wrong. We're dealing with public bodies here. We're dealing basically with part-time officials. They have no profit motive. Their employees have no profit motive; they're dealing in the public interest. Why should they be judged at a higher standard than they were when they took office? More importantly, why should they be judged at a higher

standard than we judge ourselves on this floor? I guess that's the one that really got to me.

"As I understand scienter, and I believe I am correct, it says that the claim of fraud against public officials requires proof of scienter. That proof is knowing reckless or intent to defraud. I am not even sure that the members on this floor are held to that standard. I suspect we are even immune from that standard, so I repeat to you, these are public officials. They are part-time -- practically all of them. They serve in the public interest. The court changed the rules. This bill purports to change the rules back to where they were in the first place, so we all play by the same rules. I do not believe we are impounding any money here. I don't believe that at all. I believe we are putting public officials and the rate payers — actually not the rate payers, but the tax payers — almost totally under the same standard that they were under when this whle thing started. I believe that's absolutely fair and I'd recommend a 'yes' vote."

REMARKS BY SENATOR GUESS

Senator Guess: "Mr. President,I have a different view of the ball game that Senator Goltz was playing awhile ago. I think that at the end of the eighth inning, the supreme court said a contract wasn't a contract and the rest of the game is going to be play by anybody's rules — sort of like Senator Henry's gavel. I have taken the short end of that gavel a number of times and it got faster and faster as time went on — not to depreciate that Al is my best friend. I still think that Senator Talmadge is right and if we go in and pass the bill, then what we are going to do is that we are going to say all bets are off."

REMARKS BY SENATOR BAUER

Senator Bauer: "Thank you, Mr. President and members of the Senate. I reluctantly move into an area of which I know

very little about the law, but I do believe I know something about common sense and fairness. This legislative body which has the responsibility of making the legislative decisions of this state, made a decision and set a rule of scienter. One judge decided that he was more powerful or hold than this Legislature and he made the determination to change that particular rule.

"Now all we are doing here is going back and exercising our legislative authority to reestablish that rule. I guess it's a choice of deciding to put all of our elected officials out there who ran for office — agreed to serve, based on certain rules. Then we change the rules in midstream. Those people all ought to quit, because now they are going to operate under rules that subjects them to some extremely heavy personal financial liability. Now if we want them all to quit, then we should vote 'no,' but if we want them to know that this legislative body will maintain rules that will be fair and protect them at the time that they run for office, then they will run for office.

"The choice, I guess, is between giving those people some assurances and protection to serve on boards and commissions with very little compensation, or a choice of giving to some bondholders, who at 15 percent interest, knew at the time they were going into it, that they were high risk. Bondholders all over the United States of America — a choice of protecting fairness to the people that hold offices in our localities at very little compensation or protection of bondholders who are making a profit — high risk — good return on their investments — and many of them made a good return before these changes were made. I urge your support of the bill."

REMARKS BY SENATOR MOORE

Senator Moore: "Mr. President and fellow members. I am the only one here whose name is on this bill. I am going to

vote against it. I do not yet see why the private sector should be treated differently from the public sector. More boards in this state — more board members in this state serve for free than get paid, by at least, tenfold, so I am wondering why we have to grant this very special immunity.

"Now I personally do not believe that what we do here today is going to influence this court case or these court cases, because there may be nothing left after the attorneys get through. Even if there is something left, I doubt that one percent of what we do here will be of any effect. I don't like to speak in terms of principal, but I can't think of another word and I don't like the Legislature stepping in and changing contracts. Now the PUD's made a contract with the underwriter; the underwriter made a contract with the individuals and it traces all the way back to the beginning. I have to rest my case on that point. Thank you."

The President declared the question before the Senate to be the roll call on final passage of Engrossed Substitute Senate Bill No. 3990.

ROLL CALL

The Secretary called the roll on final passage of Engrossed Substitute Senate Bill No. 3990 and the bill passed the Senate by the following vote: Yeas, 30; nays, 17; excused, 2.

Voting yea: Senators Bailey, Barr, Bauer, Bender, Benitz, Bottiger, Conner, Craswell, DeJarnatt, Fleming, Gaspard, Goltz, Granlund W., Halsan,Hansen, Johnson, Kreidler, Lee McManus, Metcalf, Owen, Peterson, Pullen, Rasmussen, Rinehart, Sellar, Thompson, Vognild, Williams, Wojahn — 30.

Voting nay: Senators Bluechel, Cantu, Deccio, Garrett, Guess, Hayner, Kiskaddon, McCaslin, McDermott, McDonald, Moore, Newhouse, Saling, Stratton, Talmadge, Warnke, Zimmerman — 17.

Excused: Senators Patterson, von Reichbauer — 2.

ENGROSSED SUBSTITUTE SENATE BILL NO. 3990, having received the constitutional majority, was declared past. There being no objection, the title of the bill will stand as the title of the act.

EXCERPTS FROM WASHINGTON PUBLIC POWER SUPPLY SYSTEM BOND RESOLUTION 890

BOARD OF DIRECTORS

RESOLUTION No. 890

A RESOLUTION PROVIDING A PLAN AND SYSTEM FOR THE ACQUISITION AND CONSTRUCTION BY WASHINGTON PUBLIC POWER SUPPLY SYSTEM OF A NUCLEAR GENERATING PLANT TO BE KNOWN AS WASHINGTON PUBLIC POWER SUPPLY SYSTEM NUCLEAR PROJECT NO. 4, AND THE CONSTRUCTION BY SAID SYSTEM OF A NUCLEAR GENERATING PLANT TO BE KNOWN AS WASHINGTON PUBLIC POWER SUPPLY SYSTEM NUCLEAR PROJECT NO. 5 AND THE ACQUISITION BY SAID SYSTEM OF AN OWNERSHIP INTEREST THEREIN; PROVIDING FOR CERTAIN OTHER CORPORATE PURPOSES OF SAID SYSTEM; AND PROVIDING FOR THE ISSUANCE OF REVENUE BONDS FOR SAID PURPOSES.

Adopted February 23, 1977

ARTICLE II

Plan and System

Section 2.1. *Findings and Determinations.* The Board has caused various engineering reports and surveys and economic and environmental studies to be made and submitted to it relating, among other things, to the prospective needs for electricity for all uses on the part of the members of the System and the other Participants. The Board concurs in the report of the Managing Director of the System, and hereby finds, that this Resolution is an implementing step in furtherance of the Projects pursuant to the plan and system adopted by the Board on July 24, 1975, that said environmental studies are adequate, that no substantial changes have been made in the Projects since said date, and that this Resolution, and the implementation hereof, do not involve a major action significantly affecting the quality of the environment. After due consideration and analysis of said engineering reports and surveys and economic environmental studies, the Board hereby finds and determines as follows:

A. The acquisition and construction by the System of the WPPSS No. 4 Project, and the construction by the System of the WPPSS No. 5 Project and the acquisition by it of its Ownership Share thereof, are necessary and advisable in order to provide for the prospective power needs of the Participants; the disposition of the power and energy, including capability, from the Projects, substantially as provided in the Participants' Agreements, will result in substantial economies and advantages to the Participants, the people of the State of Wash-

ington and the Pacific Northwest; and the Projects are economically feasible and required to to conserve the resources of the region.

B. The power and energy, including capability, which will be produced by the Projects can be disposed of at prices sufficient, with all other available revenues, to retire the Bonds, to establish reserves as herein provided, to retire the revenue bonds of the System heretofore issued in connection with the Projects and to pay the System's share of the costs of operation and maintenance of the Projects and renewals, replacements and repairs thereto.

C. The public interest, welfare, convenience and necessity require the acquisition and construction by the System of the WPPSS No. 4 Project and the construction by the System of the WPPSS No. 5 Project and the acquisition by it of its Ownership Share thereof, as a separate utility system for the purpose of supplying the power needs of the Participants which are members of the System, the inhabitants thereof and any other persons, including public or private corporations, within or without their limits, with electricity for all uses.

D. The acquisition and construction by the System of the WPPSS No. 4 Project, and the construction by the System of the WPPSS No. 5 Project and the acquisition by it of its Ownership Share thereof, will properly and advantageously contribute to the conduct of the business of the System in an efficient and economical manner.

ARTICLE XIV

MISCELLANEOUS; DEFEASANCE

SECTION 14.1 *Resolution and Laws a Contract with Bondholders.* This Resolution is adopted under the authority of and in full compliance with the Constitution and laws of the State of Washington, including Titles 43 and 54 of the Revised Code of Washington, as amended and supplemented. In consideration of the purchase and acceptance of the Bonds by those who shall hold the same from time to time, the provisions of the Resolution and of said laws shall constitute a contract with the holder or holders of each Bond and coupon pertaining thereto, and the obligations of the System and the Board under said laws and under the Resolution shall be enforceable by any court of competent jurisdiction, and the covenants and agreements herein set forth to be performed on behalf of the System shall be for the equal benefit, protection and security of the holders of any and all of said Bonds and coupons pertaining thereto, all of which regardless of the time or times of their issue or maturity shall be of equal rank without preference, priority or distinction of any of said Bonds or coupons pertaining thereto over any others thereof except as expressly provided in the Resolution.

EXCERPTS FROM WASHINGTON PUBLIC POWER SUPPLY SYSTEM RESOLUTION NO. 911, DATED APRIL 22, 1977

BOARD OF DIRECTORS

RESOLUTION NO. 911

A. SUPPLEMENTAL RESOLUTION AMENDING CERTAIN SECTIONS OF RESOLUTION NO. 890 OF THE BOARD OF DIRECTORS OF WASHINGTON PUBLIC POWER SUPPLY SYSTEM

WHEREAS, the Board adopted Resolution No. 890 (hereinafter called the "Resolution") on February 23, 1977;

WHEREAS, the Bond Fund Trustee appointed pursuant to the Resolution has requested that the Resolution be amended in certain respects, as set forth in Section 2 hereof;

WHEREAS, the Bond Fund Trustee has determined that such amendments may be made in accordance with Section 10.1(9) of the Resolution; and

WHEREAS, it is deemed necessary and advisable that such amendments be made at this time;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF WASHINGTON PUBLIC POWER SUPPLY SYSTEM AS FOLLOWS:

SECTION 1. *Definitions.* Unless the context shall clearly indicate otherwise, the terms used in this supplemental resolution, including the preambles hereto, which are defined in the Resolution shall have the meanings set forth in the Resolution.

SECTION 2. *Amendment of Certain Sections of the Resolution.* Pursuant to paragraph (9) of Section 10.1 of the Resolution, and in order to cure ambiguities, defects and inconsistent provisions in the Resolution and to insert provisions clarifying matters and questions arising under the Resolution, which provisions the Board hereby finds and determines to be necessary and desirable and not contrary to or inconsistent with the Resolution as heretofore in effect.

* * *

(e) Article XIV of the Resolution is amended by adding a new section as the last section thereof to read as follows:

> "Section 14.11. *Governing Law.* The Resolution and each Bond shall be deemed to be a contract made under the laws of the State of Washington, and for all purposes shall be construed in accordance with, and their validity governed by, the laws of said State, except that, to the extent not prohibited by the laws of the State of Washington, the Bond Fund Trustee's immunities and the standard of care in the performance of its duties, obligations and responsibilities under the Resolution shall be construed in accordance with and governed by the laws of the state in which the Bond Fund Trustee maintains its principal office."

SECTION 3. *Governing Law.* This supplemental resolution shall be deemed to be a contract made under the laws of the State of Washington, and for all purposes, except as otherwise provided in the Resolution, shall be construed in accordance with, and its validity governed by, the laws of said state.

FACSIMILE OF WASHINGTON PUBLIC POWER
SUPPLY SYSTEM BOND CERTIFICATE FOR
NUCLEAR PROJECTS 4 AND 5

UNITED STATES OF AMERICA -:- STATE OF WASHINGTON

No. 998

No. 998

WASHINGTON PUBLIC POWER SUPPLY SYSTEM

GENERATING FACILITIES REVENUE BOND, SERIES 1978C

(Nuclear Projects Nos. 4 and 5)

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a municipal corporation and joint operating agency of the State of Washington (hereinafter called the "System"), for value received hereby promises to pay to the bearer or, if this bond be registered as to principal, to the registered owner hereof,

ON THE FIRST DAY OF JULY,

1991

the principal sum of FIVE THOUSAND DOLLARS ($5,000)

upon the presentation and surrender hereof, and to pay interest on such principal sum from the date hereof at the rate of

SIX PER CENTUM (6.00%)

per annum, payable July 1, 1979, and semi-annually thereafter on the first day of January and the first day of July in each year until the payment in full of such principal sum, but, in the case of the interest due on or before maturity, only upon the presentation and surrender of the respective interest coupons representing such interest hereto attached as they severally mature.

Principal of, premium, if any, and interest on this bond are payable solely out of the special fund of the System known as the "Generating Facilities Revenue Bond Fund" (hereinafter referred to as the "Bond Fund"). Payment of such principal, premium and interest will be made at the principal office of CHEMICAL BANK in the City of New York, New York, or, at the option of the holder hereof or of such coupons, as the case may be, at the principal office of HARRIS TRUST AND SAVINGS BANK in the City of Chicago, Illinois, or at the principal office of BARRIER NATIONAL BANK in the City of Seattle, Washington, as Paying Agents of the System, in such coin or currency of the United States of America which at the time of payment is legal tender for public and private debts.

This bond is one of a duly authorized series of bonds of like designation herewith, aggregating One Hundred Seventy Million Dollars ($170,000,000) in principal amount. This bond and the bonds of the series of which it is a part are issued under the authority of and in full compliance with the Constitution and statutes of the State of Washington, including Titles 43 and 54 of the Revised Code of Washington, and under and pursuant to Resolution No. 890, duly adopted by the Board of Directors of the System on February 23, 1977, as amended by Resolution No. 911, duly adopted by said Board on April 22, 1977 (hereinafter referred to as the "Bond Resolution"), and a resolution supplemental thereto, Resolution No. 984, duly adopted by said Board on October 12, 1978 (hereinafter referred to as the "Series Resolution").

This bond and the bonds of the series of which it is a part constitute a part of a duly authorized issue of bonds (hereinafter referred to as the "Bonds") issued, or to be issued, by the System under the Bond Resolution for the purpose of paying the cost of the System under the Bond Resolution of the construction and acquisition of all or an undivided ownership interest in certain nuclear electric generating facilities, consisting and to be known as the Washington Public Power Supply System Nuclear Projects Nos. 4 and 5, as a separate utility system of the System (said separate utility system, including all additions, betterments, extensions and improvements thereto to be hereinafter referred to as the "Projects") and for certain other corporate purposes of the System. The Bonds of this series are the issuance of additional bonds, in addition to the Bonds, for certain limited purposes authorized thereby, ranking on a parity with the Bonds and secured by an equal charge and lien on the revenues of the Projects.

Copies of the Bond Resolution and the Series Resolution are on file at the principal office of the System, at the principal office of Chemical Bank in the City of New York, New York, the Bond Fund Trustee appointed pursuant to the Bond Resolution, and at the principal office of each of the Paying Agents, hereto, and reference thereto and to all modifications and amendments thereof is hereby made for a more complete description of the revenues available for the payment of the principal of, premium, if any, and interest on the Bonds and the rights and remedies of the holders of the Bonds with respect thereto, the terms and conditions upon which the Bonds have been and may be issued and the terms and provisions upon which this Bond shall no longer be secured by the Bond Resolution or deemed to be outstanding thereunder if moneys or certain specified securities shall have been deposited with the Bond Fund Trustee or any Paying Agent hereto sufficient and held in trust solely for the payment hereof.

Under the Bond Resolution the System is obligated to set aside and pay into the Bond Fund out of the gross revenues of the Projects certain fixed amounts sufficient to pay the principal of, premium, if any, and interest on all Bonds at any time outstanding as the same become due and payable, all as is more fully provided in the Bond Resolution. The Bonds and the interest thereon constitute the only charge against the Bond Fund and the amount of the revenues pledged to the Bond Fund.

proper operation and maintenance of the Projects, and all necessary repairs thereto and replacements and renewals thereof.

The Bonds of the series of Bonds of which this Bond is a part are subject to redemption prior to maturity, at the option of the System, on and after July 1, 1988, as a whole at any time, or in part from time to time by lot on any interest payment date in the inverse order of their maturities and by lot within a maturity, at the redemption prices with respect to each Bond, expressed as a percentage of the principal amount of the Bond to be redeemed, set forth below, together with the interest accrued on such principal amount to the date fixed for redemption:

Period During Which Redeemed (Both Dates Inclusive)	Redemption Prices
July 1, 1988 to June 30, 1991	103%
July 1, 1991 to June 30, 1996	102
July 1, 1996 to June 30, 2001	101
July 1, 2001 and thereafter	100

provided, however, that the System further reserves the right to redeem prior to maturity the Bonds of the series of Bonds of which this Bond is a part maturing (a) on July 1, 2010, and on July 1, 2018, in part from time to time by lot on any interest payment date on and after January 1, 2004, and on and after January 1, 2011, respectively, upon payment of the principal amount thereof from the amounts credited to the Bond Retirement Account in the Bond Fund pursuant to paragraph C of Section 6.2 of the Bond Resolution, and (b) on July 1, 2018, in part from time to time by lot on any interest payment date on and after July 1, 1987, upon payment of 101% of the principal amount thereof from excess moneys available therefor in the Bond Retirement Account in the Bond Fund resulting from the payments therein pursuant to Section 6.11 of the Bond Resolution, in each case together with the interest accrued on such principal amount to the date fixed for redemption; and provided further that the System further reserves the right to redeem prior to maturity any of the Bonds of the series of Bonds of which this Bond is a part, as a whole at any time, or in part from time to time by lot on any interest payment date in the inverse order of their maturities and by lot within a maturity, from moneys available therefor in the Bond Retirement Account in the Bond Fund resulting from the payments thereof pursuant to Section 9.7 of the Bond Resolution, or in the event any Project is terminated as provided in Section 9.8 of the Participants Agreement referred to in the Bond Resolution, upon payment of the principal amount of the Bonds to be redeemed, together with the interest accrued thereon to the date fixed for redemption.

In the event the System should exercise its option to redeem any of the Bonds, notice of such redemption shall be given by publication of a notice at least once on any business day of the week in financial papers of an newspaper printed in the English language and customarily published on each business day and of general circulation in the cities of Seattle, Washington, Chicago, Illinois, and New York, New York, the date of publication in each case to be not less than thirty (30) days nor more than sixty (60) days prior to the date fixed for redemption. Notice of redemption so given by publication as aforesaid, on the date fixed for redemption, where shall be sufficient moneys in the paying agents for the Bonds so called for redemption moneys sufficient for the redemption thereof, or if such Bonds shall no longer be deemed to be outstanding under the Bond Resolution, such Bonds shall on such date become due and payable at the applicable redemption price herein provided, and from and after such date interest on such Bonds shall cease to accrue.

This Bond may be registered as to principal only in accordance with the provisions for such registration endorsed hereon, and unless registered (other than to bearer) is transferable merely by delivery. Such registration shall not affect the coupons pertaining hereto, which shall at all times be transferable merely by delivery.

The Bonds of the series of Bonds of which this Bond is a part are issuable as Coupon Bonds, registrable as to principal only, in the denomination of $5,000, and as Registered Bonds without coupons

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a municipal corporation and joint operating agency of the State of Washington (hereinafter called the "System"), for value received hereby promises to pay to the bearer or, if this bond be registered as to principal, to the registered owner hereof,

ON THE FIRST DAY OF JULY,

1991

the principal sum of **FIVE THOUSAND DOLLARS ($5,000)**

upon the presentation and surrender hereof, and to pay interest on such principal sum from the date hereof at the rate of

SIX PER CENTUM (6.00%)

per annum, payable July 1, 1979, and semi-annually thereafter on the first day of January and the first day of July in each year until the payment in full of such principal sum; but, in the case of the interest due on or before maturity, only upon the presentation and surrender of the respective interest coupons representing such interest hereto attached as they severally mature.

Principal of, premium, if any, and interest on this bond are payable solely out of the special fund of the System known as the "Generating Facilities Revenue Bond Fund" (hereinafter referred to as the "Bond Fund"). Payment of such principal, premium and interest will be made at the principal office of CHEMICAL BANK in the City of New York, New York, or at the option of the holder hereof or of such coupons, as the case may be, at the principal office of BANKERS TRUST AND SAVINGS BANK in the City of Chicago, Illinois, or at the principal office of RAINIER NATIONAL BANK in the City of Seattle, Washington, as Paying Agents of the System, in such coin or currency of the United States of America which at the time of payment is legal tender for public and private debts.

This bond is one of a duly authorized series of bonds of like designation herewith, aggregating One Hundred Seventy Million Dollars ($170,000,000) in principal amount. This bond and the bonds of the series of which it is a part are issued under the authority of and in full compliance with the Constitution and statutes of the State of Washington, including Titles 43 and 54 of the Revised Code of Washington, and under and pursuant to Resolution No. 890, duly adopted by the Board of Directors of the System on February 23, 1977, as amended by Resolution No. 911, duly adopted by said Board on April 22, 1977 (hereinafter referred to as the "Bond Resolution"), and a resolution supplemental thereto, Resolution No. 984, duly adopted by said Board on October 12, 1978 (hereinafter referred to as the "Series Resolution").

This bond and the bonds of the series of which it is a part constitute a part of a duly authorized issue of bonds (hereinafter referred to as the "Bonds") issued, or to be issued, by the System under the Bond Resolution for the purpose of paying the cost to the System of the construction and acquisition of all or an undivided ownership interest in certain nuclear electric generating facilities, constituting and to be known as the Washington Public Power Supply System Nuclear Projects Nos. 4 and 5, as a separate utility system of the System (said separate utility system including all additions, betterments, extensions and improvements thereto being hereinafter referred to as the "Projects") and for certain other corporate purposes of the System. The Bond Resolution permits the issuance of additional bonds in addition to the Bonds, for certain limited purposes specified therein, ranking on a parity with the Bonds and secured by an equal charge and lien on the revenues of the Projects.

Copies of the Bond Resolution and the Series Resolution are on file at the principal office of the System, at the principal office of Chemical Bank in the City of New York, New York, the Bond Fund Trustee appointed pursuant to the Bond Resolution, and at the principal offices of each of the Paying Agents hereof, and reference thereto and to all modifications and amendments thereof is hereby made for a more complete description of the revenues available for the payment of the principal of, premium, if any, and interest on the Bonds and the rights and remedies of the holders of the Bonds with respect thereto, the terms and conditions upon which the Bonds have been and may be issued and the terms and provisions upon which this Bond shall no longer be secured by the Bond Resolution or deemed to be outstanding thereunder if moneys or certain specified securities shall have been deposited with the Bond Fund Trustee or any Paying Agent therefor sufficient and held in trust solely for the payment hereof.

Under the Bond Resolution the System is obligated to set aside and pay into the Bond Fund out of the gross revenues of the Projects certain fixed amounts sufficient to pay the principal of, premium, if any, and interest on all Bonds at any time outstanding as the same become due and payable, all as is more fully provided in the Bond Resolution. The Bonds and the interest thereon constitute the only charge against the Bond Fund and the amount of the revenues pledged to the Bond Fund.

In case an Event of Default (defined in the Bond Resolution) shall occur, the principal of the Bonds and any additional bonds ranking on a parity with the Bonds issued pursuant to the Bond Resolution at such time outstanding may be declared due and payable by the Bond Fund Trustee or by the holders of 20% in principal amount of such Bonds and additional bonds, but such declaration may, under certain circumstances, be annulled.

In and by the Bond Resolution, the System covenants to establish, maintain and collect rates or charges for electric power and energy, including capability, and other services, facilities and commodities sold, furnished or supplied through the facilities of the Projects which shall be fair and non-discriminatory and adequate to provide revenues sufficient for the fixed amounts which the System is obligated to set aside in the Bond Fund to pay the principal of, premium, if any, and interest on the Bonds, and for the proper operation and maintenance of the Projects, and all necessary repairs thereto and replacements and renewals thereof.

The Bonds of the series of Bonds of which this Bond is a part are subject to redemption prior to maturity, at the option of the System, on and after July 1, 1988, as a whole at any time, or in part from time to time on any interest payment date in the inverse order of their maturities and by lot within a maturity, at the redemption prices with respect to each Bond, expressed as a percentage of the principal amount of the Bond to be redeemed, set forth below, together with the interest accrued on such principal amount to the date fixed for redemption:

Period During Which Redeemed (Both Dates Inclusive)	Redemption Prices
July 1, 1988 to June 30, 1991	103%
July 1, 1991 to June 30, 1996	102
July 1, 1996 to June 30, 2001	101
July 1, 2001 and thereafter	100

provided, however, that the System further reserves the right to redeem prior to maturity the Bonds of the series of Bonds of which this Bond is a part maturing (a) on July 1, 2010, and on July 1, 2018, in part from time to time by lot on any interest payment date on and after January 1, 2004, and on and after January 1, 2011, respectively, upon payment of the principal amount thereof from the amounts credited to the Bond Retirement Account in the Bond Fund pursuant to paragraph C of Section 6.2 of the Bond Resolution, and (b) on July 1, 2018, in part from time to time by lot on any interest payment date on and after July 1, 1987, upon payment of 101% of the principal amount thereof from excess moneys available therefor in the Bond Retirement Account in the Bond Fund resulting from the payments therein pursuant to Section 6.11 of the Bond Resolution, in each case together with the interest accrued on such principal amount to the date fixed for redemption; and provided further that the System further reserves the right to redeem prior to maturity all of the Bonds of the series of Bonds of which this Bond is a part, as a whole at any time, or in part from time to time on any interest payment date in the inverse order of their maturities and by lot within a maturity, from moneys available therefor in the Bond Retirement Account in the Bond Fund resulting from the payments therein pursuant to Section 9.7 of the Bond Resolution, or in the event any Project is terminated as provided in Section 9.8 of the Participants Agreement referred to in the Bond Resolution, upon payment of the principal amount of the Bonds to be redeemed, together with the interest accrued thereon to the date fixed for redemption.

In the event the System should exercise its option to redeem any of the Bonds, notice of such redemption shall be given by publication of such notice at least once on any business day of the week in financial papers or in newspapers printed in the English language and customarily published on each business day and of general circulation in the cities of Seattle, Washington, Chicago, Illinois and New York, New York, the date of publication in each case to be not less than thirty (30) nor more than sixty (60) days prior to the date fixed for redemption. Notice of redemption having been given by publication as aforesaid, on the date fixed for redemption there shall become due and payable to the Paying Agents for the Bonds so called for redemption moneys sufficient for the redemption thereof, or if such Bonds shall no longer be deemed to be outstanding under the Bond Resolution, such Bonds shall on such date become due and payable at the applicable redemption price herein provided, and from and after such date interest on such Bonds shall cease to accrue.

This Bond may be registered as to principal only in accordance with the provisions for such registration endorsed hereon, and unless registered (other than to bearer) is transferable merely by delivery. Such registration shall not affect the coupons pertaining hereto, which shall at all times be transferable merely by delivery.

The Bonds of the series of Bonds of which this Bond is a part are issueable as Coupon Bonds, registrable as to principal only, in the denomination of $5,000, and as Registered Bonds without coupons in denominations of $5,000 and any multiples of $5,000. The Coupon Bonds and the Registered Bonds without coupons are interchangeable for an equal aggregate principal amount of Bonds of the same series, interest rate and maturity upon presentation thereof for such purpose by the holder or registered owner at the principal office of the Bond Fund Trustee, and upon payment of charges and otherwise as provided in the Bond Resolution.

It is hereby certified, recited and declared that all acts, conditions and things required by the Constitution and statutes of the State of Washington to exist, to have happened and to have been performed precedent to and in the issuance of this Bond do exist, have happened and have been performed in due time, form and manner as prescribed by law, and that the amount of this Bond, together with all other obligations or indebtedness of the System, does not exceed any constitutional or statutory limitations of indebtedness.

IN WITNESS WHEREOF, WASHINGTON PUBLIC POWER SUPPLY SYSTEM, by its Board of Directors, has caused this Bond to be executed in its name with the facsimile signature of the President of its Board of Directors, and attested by the manual signature of the Secretary or Assistant Secretary of its Board of Directors or Treasurer or Assistant Treasurer of the System thereunto duly authorized, and the seal of the System to be impressed or a facsimile thereof imprinted hereon, and the interest coupons pertaining hereto to be executed by the facsimile signatures of the said President and Secretary, all as of the first day of October, 1978.

STATE AUDITOR'S CERTIFICATE OF REGISTRATION

STATE OF WASHINGTON
OFFICE OF STATE AUDITOR } ss

I DO HEREBY CERTIFY that I have examined the within Bond and certified copies of the resolutions authorizing the issuance thereof, and such additional information with respect thereto as is required by me, and that the within Bond has been registered in my office in accordance with the provisions of Section 54.24.070 of the Revised Code of Washington.

WITNESS my hand and seal of office October 24, 1978.

Robert V. Graham
Auditor of the State of Washington

By
Deputy State Auditor

WASHINGTON PUBLIC POWER SUPPLY SYSTEM CORPORATE SEAL 1957 WASHINGTON

WASHINGTON PUBLIC POWER SUPPLY SYSTEM

BY John A. Goldsborough
PRESIDENT

ATTEST:

AUTHORIZED OFFICER

AMERICAN BANK NOTE COMPANY

CERTIFICATION

It is hereby certified that the following is a true and complete copy (except for letterheads) of the final legal opinions of Messrs. Wood & Dawson, New York, New York, and Messrs. Houghton Cluck Coughlin & Riley, Seattle, Washington, approving the series of bonds of which the within bond is one, the originals of which opinions were manually executed, dated and issued as of the date of delivery of and payment for said bonds and are on file in the office of the Secretary of Washington Public Power Supply System.

E Taylor

Secretary of Washington Public Power Supply System

LEGAL OPINION

WOOD & DAWSON
48 Wall Street, New York, New York 10005

HOUGHTON CLUCK COUGHLIN & RILEY
900 Hoge Building, Seattle, Washington 98104

Board of Directors
Washington Public Power Supply System
Richland, Washington

Dear Sirs:

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, GENERATING FACILITIES REVENUE BONDS, SERIES 1978C (NUCLEAR PROJECTS NOS. 4 AND 5), $170,000,000

At your request we have examined into the validity of an issue of $170,000,000 Generating Facilities Revenue Bonds, Series 1978C (Nuclear Projects Nos. 4 and 5), of Washington Public Power Supply System (the "System"), a municipal corporation and joint operating agency of the State of Washington. Said bonds are issuable in coupon form, registrable as to principal only, in the denomination of $5,000 each, and in fully registered form, without coupons, in denominations of $5,000 and any multiples thereof. The coupon bonds are numbered from 1 upwards and are dated October 1, 1978. The fully registered bonds are numbered from R-1 upwards and, except fully registered bonds initially issued, which are dated October 1, 1978, shall be dated so that no gain or loss of interest shall result from exchanges or transfers thereof as provided therein and in the Bond Resolution hereinafter mentioned. Said bonds mature on July 1 in each of the years and in the amounts and bear interest at the rates per annum, payable semi-annually on January 1 and July 1 beginning July 1, 1979, as follows:

Year	Amount	Interest Rate	Year	Amount	Interest Rate
1989	$1,800,000	6.00%	1997	$ 3,090,000	6.10%
1990	1,925,000	6.00	1998	3,310,000	6.20
1991	2,060,000	6.00	1999	3,540,000	6.25
1992	2,205,000	6.00	2000	3,790,000	6.30
1993	2,360,000	6.00	2001	4,055,000	6.40
1994	2,525,000	6.00	2002	4,335,000	6.40
1995	2,700,000	6.00	2003	4,640,000	6.50
1996	2,890,000	6.10	2010	42,970,000	6.75
			2018	81,805,000	7.00

Said bonds are subject to redemption prior to maturity upon the terms and conditions set forth therein, and recite that they are issued under and pursuant to Resolution No. 890, adopted by the Board of Directors of the System on February 23, 1977, as amended, and a resolution supplemental thereto, Resolution No. 984, adopted by said Board on October 12, 1978 (collectively, the "Bond Resolution"), and under the authority of and in full compliance with the Constitution and statutes of the State of Washington, including Titles 43 and 54 of the Revised Code of Washington, for the purpose of paying the cost to the System of the construction and acquisition of all or an undivided ownership interest in certain nuclear electric generating facilities, constituting and to be known as the Washington Public Power Supply System Nuclear Projects Nos. 4 and 5, as a separate utility system of the System and for certain other corporate purposes of the System.

We have examined the Constitution and statutes of the State of Washington, certified copies of proceedings of the Board of Directors of the System authorizing the issuance of said bonds, including the Bond Resolution, other proofs relating to the issuance of said bonds and an executed coupon bond of said series.

In our opinion, the System is a municipal corporation and joint operating agency of the State of Washington, duly created and validly existing, the Bond Resolution has been duly adopted and the provisions thereof are valid and binding upon the System, said bonds have been duly authorized and issued in accordance with the Constitution and statutes of the State of Washington, and said bonds constitute valid and legally binding obligations of the System payable solely from the funds and revenues as set forth and provided in the Bond Resolution on a parity with the bonds heretofore or hereafter issued on a parity therewith pursuant to the Bond Resolution.

In a lawsuit pending in the Superior Court for Grays Harbor County, Washington (**Washington Public Power Supply System v. Dale et al.**; No. 70423), the defendants, among other things, question the legal existence of the System and its corporate powers with respect to the construction of nuclear reactors, including the aforesaid Nuclear Projects Nos. 4 and 5. We are of the opinion that such claim is without merit.

It is to be understood that the rights of the holders of said bonds under the same and under the Bond Resolution and the enforceability thereof under the same may be subject to general principles of equity which permit the exercise of judicial discretion and to valid bankruptcy, insolvency, reorganization, moratorium and other laws for the relief of debtors.

It is also our opinion that the interest on said bonds is exempt from taxation by the United States of America under existing laws and regulations.

Very truly yours,
WOOD & DAWSON
HOUGHTON CLUCK COUGHLIN & RILEY

UNITED STATES OF AMERICA
STATE OF WASHINGTON

WASHINGTON PUBLIC POWER SUPPLY SYSTEM

CUSIP 939821 DW 1

6.00%

GENERATING FACILITIES REVENUE BOND SERIES 1978C (Nuclear Projects Nos. 4 and 5)

DUE JULY 1,

1991

INTEREST PAYABLE

JANUARY 1 and JULY 1

PRINCIPAL AND INTEREST PAYABLE
AT THE PRINCIPAL OFFICE OF
CHEMICAL BANK
IN THE CITY OF NEW YORK, NEW YORK,
OR AT THE PRINCIPAL OFFICE OF
HARRIS TRUST AND SAVINGS BANK
IN THE CITY OF CHICAGO, ILLINOIS,
OR AT THE PRINCIPAL OFFICE OF
RAINIER NATIONAL BANK
IN THE CITY OF SEATTLE, WASHINGTON

REGISTRABLE AT THE PRINCIPAL OFFICE OF
CHEMICAL BANK
IN THE CITY OF NEW YORK, NEW YORK

PROVISIONS FOR REGISTRATION

This Bond may be registered as to principal only in the name of the holder on books of registration to be kept at the principal office of Chemical Bank in the City of New York, New York, the Bond Fund Trustee and Registrar, such registration to be noted in the registration blank below. After such registration no transfer hereof shall be valid unless made on said books and similarly noted hereon, but such registration may be made to bearer and thereupon transferability by delivery shall be restored. The registration of this Bond as to principal only shall not affect the coupons which shall at all times be transferable merely by delivery.

(NOTICE: NO WRITING ON THIS BOND EXCEPT BY REGISTRAR)

Date of Registration	Name of Registered Owner	Signature of Registrar

EXCERPTS FROM OFFICIAL STATEMENT ISSUED BY WASHINGTON PUBLIC POWER SUPPLY SYSTEM, DATED MARCH 17, 1981

Ratings: Moody's: A1
Standard & Poor's: A+
(see "Ratings" herein)

Washington Public Power Supply System

$170,000,000

GENERATING FACILITIES REVENUE BONDS, SERIES 1981A (NUCLEAR PROJECTS NOS. 4 AND 5)

Dated: March 1, 1981 **Due: July 1, as shown below**

AMOUNTS, MATURITIES, COUPONS, YIELDS AND PRICES

Amount	Due (July 1)	Coupon	Price	Amount	Due (July 1)	Coupon	Price
$ 500,000	1989	10.50%	100%	$3,075,000	1993	11.30%	100%
1,000,000	1990	10.75	100	3,185,00	1994	11.40	100
1,560,000	1991	11.00	100	3,475,000	1995	11.50	100
2,460,000	1992	11.20	100				

$ 27,105,000 11.75% Term Bonds Due July 1, 2000, Price 99½%
$102,640,000 12% Term Bonds Due July 1, 2009, Price 100%
$ 25,000,000 10¼% Term Bonds Due July 1, 2011, Priced to Yield 11.65%

(Plus Accrued Interest)

$30,000,000

11% GENERATING FACILITIES REVENUE BONDS, SERIES 1981B (NUCLEAR PROJECTS NOS. 4 AND 5)

Dated: March 1, 1981 **Due: July 1, 2009**

The 1981B Bonds will be payable at the option of the holders on July 1, 1991 or any July 1 thereafter upon notice given by the holders as described herein.

Interest is payable January 1 and July 1, commencing July 1, 1981. Chemical Bank, New York, New York, is Bond Fund Trustee. The 1981A and B Bonds will be subject to redemption prior to matury at the option of the Supply System as set forth herein.

Interest exempt, in the opinion of Bond Counsel, from federal income taxation under existing laws and regulations.

The 1981A and B Bonds and the interest thereon are payable solely from the revenues derived by the Supply System through the ownership and operation by it of

the Projects and from Bond proceeds. Such revenues include all payments to be made to the Supply System pursuant to the Participants' Agreements between the Supply System and 88 municipal corporations and cooperatives (the "Participants").

The Supply System has sold the entire capability of the Projects in shares to the Participants. Each Participant is obligated to pay the Supply System, in the manner and from the sources described herein, its Participant's share of the total annual costs of the Projects, including debt service on the Bonds, whether or not the Projects are completed, operable or operating and notwithstanding the suspension, reduction or curtailment of the Projects' output. The Participants have covenanted and agreed to establish, maintain and collect rates or charges for power and energy and other services furnished through their electric utility properties which shall be adequate to provide revenues sufficient to fulfill their obligations to the Supply System under the Participants' Agreements, including debt service on the 1981A and B Bonds. The rates of the Participants are not subject to regulation by any federal or state utility commission or similar agency.

The 1981A and B Bonds are offered when, as and if issued and received by us and are subject to the approval of legality by Wood & Dawson, New York, New York, Bond Counsel to the Supply System, and Houghton Cluck Coughlin & Riley, Seattle, Washington, Special Counsel to the Supply System. It is expected that the 1981A and B Bonds in definitive form will be ready for delivery on or about April 2, 1981.

March 17, 1981

WASHINGTON PUBLIC POWER SUPPLY SYSTEM

P.O. Box 968
Richland, Washington
Telephone (509) 372-5000

Members	Representatives to the Board of Directors
Public Utility District No. 1 of Benton County	Donald Clayhold
Public Utility District No. 1 of Chelan County	Robert O. Keiser
Public Utility District No. 1 of Clallam County	Alvin E. Fletcher*
Public Utility District No. 1 of Clark County	Ed Fischer*
Public Utility District No. 1 of Cowlitz County	Howard B. Richman
Public Utility District No. 1 of Douglas County	Howard Prey*
City of Ellensburg	Larry Nickel
Public Utility District No. 1 of Ferry County	William G. Kuehne
Public Utility District No. 1 of Franklin County	Kenneth R. Cochrane
Public Utility District No. 2 of Grant County	Harold F. Nelson
Public Utility District No. 1 of Grays Harbor County	John J. Welch
Public Utility District No. 1 of Kittitas County	Roger Sparks
Public Utility District No. 1 of Klickitat County	Marion C. Babb
Public Utility District No. 1 of Lewis County	Arnold James

Public Utility District No. 3 of Mason County	Edwin W. Taylor
Public Utility District No. 1 of Okanogan County	Stanton H. Cain
Public Utility District No. 2 of Pacific County	Hal Norman
City of Richland	Thomas M. Logston
City of Seattle	Joseph P. Recchi
Public Utility District No. 1 of Skamania County	Rolf E. Jemtegaard
Public Utility District No. 1 of Snohomish County	C. Stanford Olsen*
City of Tacoma	Paul J. Nolan*
Public Utility District No. 1 of Wahkiakum County	Charles F. Emerick*

*Executive Committee Member.

OFFICERS

Stanton H. Cain	President
John J. Welch	Vice President
Marion C. Babb	Secretary

ADMINISTRATIVE STAFF

Managing Director	R.L. Ferguson
Deputy Managing Director	A. Squire
Nuclear Projects Nos. 1 and 4 Program Director	D.W. Mazur
Nuclear Project No. 2 Program Director	R.G. Matlock
Nuclear Projects Nos. 3 and 5 Program Director (Acting)	D.E. Dobson
Treasurer	J.D. Perko
Chief Counsel	R.Q. Quigley
Internal Auditing Manager	J.J.Wentz

ADMINISTRATIVE AUDITOR
J.A. Hare

FINANCIAL CONSULTANT
Blyth Eastman Paine
Webber Incorporated
BOND COUNSEL
Wood & Dawson
SPECIAL COUNSEL
Houghton Cluck Coughlin
& Riley

CONSULTING ENGINEER
R.W. Beck and Associates
CONSTRUCTION ENGINEER –
PROJECT NO. 4
United Engineers
& Construction Inc.
CONSTRUCTION ENGINEER–
PROJECT NO. 5
Ebasco Services,
Incorporated

The information contained in this Official Statement has been obtained from the Supply System and other sources deemed reliable. No representation or warranty is made, however, as to the accuracy or completeness of such information, and nothing contained herein is, or shall be, relied upon as a promise or representation of the Underwriters. This Official Statement, which includes the cover page and exhibits, does not constitute an offer to sell the 1981A and B Bonds in any state to any person to whom it is unlawful to make such offer in such state. No dealer, salesman or other person has been authorized to give any information or to make any representation, other than those contained in this Official Statement in connection with the offering of the 1981A and B Bonds, and if given or made, such information or representation must not be relied upon. The information and expressions of opinion herein are subject to change without notice and neither the delivery of this Official Statement nor any sale made hereunder shall, under any circumstances, create any implication that there has been no change in the matters described herein since the date hereof.

* * * * *

OFFICIAL STATEMENT
OF
Washington Public Power Supply System

A Municipal Corporation and a Joint Operating Agency of the State of Washington

relating to its

$200,000,000

Aggregate Principal Amount
Generating Facilities Revenue Bonds, Series 1981A and Series 1981B
(Nuclear Projects Nos. 4 and 5)

March 17, 1981

Washington Public Power Supply System (the "Supply System") proposes to issue $170,000,000 Generating Facilities Bonds, Series 1981A (Nuclear Projects Nos. 4 and 5) (the "1981A Bonds"), and Generating Facilities Revenue Bonds, Series 1981B (Nuclear Projects Nos. 4 and 5) (the "1981B Bonds") and furnishes this Official Statement in connection with the sale of such Bonds (collectively, the "1981A and B Bonds") and for the information of all who may become holders of such Bonds.

AUTHORIZATION AND PURPOSE OF BONDS

1981A and B Bonds are part of an issue of Generating Facilities Revenue Bonds (the "Bonds"), authorized to be issued pursuant to the Revised Code of Washington, Chapter 43.52, as amended (the "Act"), and Resolution No. 890 (the "Resolution"), adopted by the Board of Directors of the Supply System on February 22, 1977, for the purpose of paying the cost of acquisiton and construction of Washington Public Power Supply System Nuclear Project No. 4 ("Nuclear Project No. 4"), which is planned to have a net generating capability of 1,250,000 kilowatts, and the Supply System's ownership share of the cost of acquisition and construction of

Washington Public Power Supply System Nuclear Project No. 5 ("Nuclear Project No. 5"), which is planned to have a net generating capability of 1,240,000 kilowatts; and for certain other purposes. The 1981A and B Bonds will be issued pursuant to resolutions supplemental to the Resolution, Resolutions Nos. 1146 and 1148, respectively (the "Supplemental Resolutions"), adopted by the Board of Directors of the Supply System on March 17, 1981. The Supply System has heretofore issued pursuant to the Resolution $2,050,000,000 principal amount of Bonds.

Nuclear Project No. 5 is 90% owned by the Supply System, such share being hereinafter referred to as the Supply System's "Ownership Share", and 10% owned by Pacific Power & Light Company ("Pacific"). Nuclear Project No. 4 and the Supply System's Ownership Share of Nuclear Project No. 5 are hereinafter referred to as the "Projects".

APPLICATION OF THE 1981A AND B BOND PROCEEDS

The application of the 1981A and B Bond proceeds is approximately as follows:

Capitalized Interest(1)	$ 89,205,000
Deposit to Reserve Account (2)	12,000,000
Bond Discount (3)	8,375,000
Deposit to Construction Fund and Estimated Financing Expenses	90,420,000
Principal Amount of 1981A and B Bonds	$200,000,000

(1) Includes actual interest on the outstanding Bonds from December 1, 1982 to March 1, 1983 and estimated interest on the 1981A and B Bonds at an assumed interest rate of 12% to March 1, 1983.

(2) Based on maximum six months' interest accruing on the 1981A and B Bonds at an assumed 12% annual interest rate.

(3) Maximum permitted by the Notice of Sale of the 1981A and B Bonds.

SECURITY FOR THE BONDS

The principal of and interest on the Bonds are payable solely from the Bond Fund created by the Resolution. The moneys pledged to the Bond Fund are limited to fixed amounts of the income, revenues and receipts derived by the Supply System through the ownership and operation by it of the Projects, including the revenues to be derived by the Supply System from the sale of power and energy from the Projects pursuant to the Participants' Agreements described below, and Bond proceeds. Such revenues also include any payments received by the Supply System pursuant to the Assignment Agreements and Short Term Sales Agreement described in "Surplus Energy — Assignment Agreements and Short Term Sales Agreement" under the caption "The Participants". The Bonds are not general obligations of the Supply System. The revenues of the Supply System derived or to be derived from the Supply System's Nuclear Projects Nos. 1, 2 and 3, Hanford Project and Packwood Lake Hydroelectric Project (hereinafter described) and any other project which may hereafter be undertaken by the Supply System are not pledged to the payment of the Bonds. The Bonneville Power Administration ("Bonneville") has not purchased any part of the capability of the Projects.

Participants' Agreements

The Supply System has sold the entire capability of the Projects to 88 municipal corporations and cooperatives which own and operate electric distribution systems (the "Participants")

pursuant to certain agreements dated July 14, 1976 (the "Participants' Agreements"). Each Participant is obligated to pay the Supply System its share of the total annual cost of the Projects, including debt service on the Bonds and the required annual payments to the reserve funds described below, whether or not the Projects are operable or operating and notwithstanding the suspension, reduction or curtailment of the Projects' output. Such payments are to commence with the earlier of the date of continuous operation of a Project or July 1, 1988, except that if the Supply System terminates a Project prior to its date of continuous operation and July 1, 1987, such payments with respect to such Project shall begin one year after the date of termination. A list of the Participants and their shares is contained in Exhibit E hereto.

The Participants' Agreements separate the default responsibilities of the Participants into two classifications: (i) Participants which are municipal corporations and (ii) Participants which are not municipal corporations. If a Participant in a classification defaults, the share of each of the remaining nondefaulting Participants in the same classification will be automatically increased pro rata up to an accumulated maximum of 25% of such latter Participant's respective original share.

Capitalized Interest

Interest on the 1981A and B Bonds will be capitalized from the proceeds thereof until March 1, 1983. The Supply System intends to capitalize, from the proceeds of sale of additional Bonds, interest on the Bonds (including interest on the 1981A and B Bonds not provided from the proceeds of the 1981A

and B Bonds) to July 1, 1988, except that if the first date of continuous operation of a Project occurs prior to July 1, 1988, the amount of interest to be capitalized is to be reduced by interest paid from revenues between such dates. Such interest payable from revenues will be proportionate to the actual annual energy generated by the Projects as compared to the expected average annual generating capability of the Projects over their useful lives. Present policy calls for monies to be set aside from the proceeds of sale of each series of Bonds sufficient, together with amounts otherwise provided for, to provide for the interest accruing on all Bonds then outstanding during the two succeeding years. The Supply System has the right to change this policy. In accordance with present policy the Supply System will further capitalize interest on the outstanding Bonds from the proceeds of the 1981A and B Bonds to March 1, 1983.

* * * *

Rate Covenants

Pursuant to the Resolution, the Supply System covenants to maintain and collect rates for power and energy from the Projects which shall be adequate to provide revenues sufficient to pay the costs of operation, maintenance, repairs and renewals of the Projects and to make all required payments to the Bond Fund, the Reserve and Contingency Fund and the Extraordinary Reserve Fund.

Payments by the Participants are required to be made under the Participants' Agreements whether or not the Projects are operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the Projects' output. No Participant is required to make such

payments to the Supply System except from revenues derived from the ownership and operation of its electric utility properties. Pursuant to the Participants' Agreements, each Participant has covenanted that it will establish, maintain and collect rates or charges for power and energy and other services furnished through its electric utility properties which shall be adequate to make the required payments to the Supply System under its Participants' Agreement. The rates of the Participants and the Supply System are not subject to regulation by any federal or state utility commission or similar agency.

* * * * *

THE PARTICIPANTS

The 88 Participants currently purchase approximately 80% of their power requirements from Bonneville. As statutory preference customers of Bonneville, the Participants, together with other public bodies and cooperatives, have a priority over non-preference customers on power sold by Bonnevilie from the Federal Columbia River Power System. In addition to the power available from Bonneville, some Participants have acquired their own generating resources and have purchased power from other utility systems in the area.

Historical Requirements

In the period from 1975 to 1979, the peak demand requirements of the Participants increassed at an average rate of approximately 9.1% per year and the energy requirements of the Participants increase at an average rate of approximately 6.7% per year. The following table shows the historical peak demand and energy requirements for the Participants:

Participants' Historical Power Requirements (1)

Calendar Year	Peak Demand (kW)	% Increase (2)	Energy (MWh)	% Increase(2)
1975.....	6,089,084	—	29,814,305	—
1976.....	6,508,310	6.9	32,499,784	9.0
1977.....	7,370,119	13.2	34,185,421	5.2
1978.....	8,018,502	8.8	35,425,168	3.6
1979.....	8,617,223	7.5	38,694,748	9.2

(1) Includes certain sales for resale. Excludes certain major sales for resale to California.

(2) Over previous year.

Projected Requirements

The Participants have each estimated their future power needs for planning purposes through the year 1995. These estimates generally are based on continued stable economic conditions and reflect a continuation of the historical uses of power, the growth potential of the Participants' service areas and the character and type of customer classes being served.

The following summarizes the Consulting Engineer's tabulation of the Participant's estimated annual power requirements as provided to the Consulting Engineer by the Participants in early 1981:

Participants' Estimated Power Requirements(1)

Calendar Year	Peak Demand (kW)	% Increase (2)	Energy (MWh)	% Increase(2)
1981	9,701,171	—	44,204,878	—
1982	10,221,625	5.4	46,905,116	6.1
1983	10,885,124	6.5	49,904,989	6.4
1984	11,365,560	4.4	52,297,893	4.8
1985	11,859,454	4.3	54,409,953	4.0
1986	12,360,047	4.2	56,620,470	4.1
1987	12,869,792	4.1	58,842,637	3.9
1988	13,379,696	4.0	61,036,445	3.7
1989	13,892,144	3.8	63,239,377	3.6
1990	14,402,750	3.7	65,482,199	3.5
1991	14,950,319	3.8	67,753,842	3.5
1992	15,487,395	3.6	70.075,784	3.4
1993	16,037,049	3.5	72,429,961	3.4
1994	16,577,212	3.4	74,727,039	3.2
1995	17,127,448	3.3	77,079,846	3.1

(1) Excludes certain sales for resale and secondary sales.
(2) Over previous year.

The average annual percentage increase in the Participants' estimated peak demand requirements for the 14 years from 1981 to 1995, as shown in the preceding table, is 4.1% per year and the average annual percentage increase in the Participants' estimated energy requirements is 4.1%.

* * * * *

THE SUPPLY SYSTEM

The Supply System, a municipal corporation and a joint operating agency of the State of Washington, was organized in January 1957, pursuant to the Act. Its membership consists of 19 operating public utility districts and the cities of Ellensburg, Richland, Seattle and Tacoma, all located in the State of Washington. The Supply System has the authority, among other things, to acquire, construct and operate plants, works and facilities for the generation and transmission of electric power and energy and to acquire uranium bearing lands, as well as to make surveys, plans, investigations or studies relating thereto. The Supply System has the power of eminent domain, but it is specifically precluded from the condemnation of any plants, works or facilities owned and operated by any city, public utility district or investor-owned electric utility.

The Supply System has its principal office in Richland, Washington. The management and control of the Supply System is vested in a Board of Directors (the "Board") composed of representatives from each of its members. The Executive Committee, consisting of seven members of the Board, administers the business of the Supply System between regular quarterly meetings of the Board. The Executive Committee meets regularly twice each month.

As of February 1, 1981 the Supply System employed 2,080 persons, including 1,178 persons in executive, finance and administrative functions, 354 persons in plant operations and 548 in the technical area. The technical staff, with electrical, mechanical, civil and nuclear engineering and other technical disciplines, has over 7,400 man-years of technical experience including 4,700 man-years of nuclear experience.

In an effort to increase construction progress, the Managing Director instituted a reorganization of the Supply System's

staff and created a special engineering task force to improve engineering interface with construction. A three month study from the task force concluded that recent management actions to end integrated management and to clarify the separate responsibilities of the owner, the architect engineer, and the construction manager were proper and necessary. The team made further recommendations to review potential overspecifications of technical requirements, delegate more authority for timely action and improve the pace of handling design changes. The team also emphasized and supported the Supply System's actions to realign selected contracts and improve coordinated scheduling. Management is presently incorporating these inputs into the new mangement processes now being implemented at the sites.

* * * * *

NUCLEAR PROJECTS NOS. 4 AND 5

Nuclear Project No. 4

Location: Nuclear Project No. 4 is located on the Hanford Reservation approximately 12 miles north of the City of Richland, Washington, and about 3 miles west of the Columbia River. Nuclear Project No. 4 is located in the vicinity of the Supply System's Nuclear Projects Nos. 1 and 2. The State of Washington has approved the site, which has been leased from DOE for a term of 30 years ending June 30, 2005, with an option granted to the Supply System to extend the lease for an additional 10 years. The Supply System has obtained a lease with the Washington State Department of Natural Resources for the location of the cooling water intake and discharge structures in the bed of the Columbia River. These structures have been completed.

Description: Nuclear Project No. 4 is being designed as a

duplicate of the Supply System's Nuclear Project No. 1 and they will share certain facilities. The current plans call for five basic structures: the reactor containment building, general services building, turbine-generator building, cooling towers and circulating water pump house, and river makeup water plant. The river makeup water plant will be shared between Nuclear Projects Nos. 1 and 4. The pressurized water nuclear steam supply system, the turbine-generator and all associated equipment are sized to give a net generating capability of 1,250,000 kilowatts. The turbine condensers will be cooled by a mechanical draft cooling tower system. Makeup water for the condenser cooling system will be obtained from the Columbia River.

Status and Schedule: As of February 1, 1981 procurement of services and equipment for Nuclear Project No. 4 was approximately 99% complete. The Supply System had entered into 176 equipment and construction contracts totalling $726,766,519 as of that date, including contracts for the nuclear steam supply system with the Babcock and Wilcox Company and for the turbine-generator and accessories with the Westinghouse Electric Corporation. The Project is in the major civil and structural phase of work. Two thirds of the steel shell of the reactor containment building has been erected; the structural steel for the general services building and the turbine-generator building is near completion; the structural steel for the circulating water pumphouse is complete; the turbine pedestal of the turbine-general building has been constructed and the cooling towers are substantially complete. Superstructure concrete on the containment and general services buildings is being installed. As of February 1, 1981, Nuclear Project No. 4 was approximately 16% complete and is scheduled to begin commercial operation in June 1986. However, it is presently expected that commercial operation will be delayed

approximately eight months because of the labor problems discussed above. See "Factors Affecting the 1981 Project Construction Budgets and Schedules" under the caption "The Supply System."

Currently, United Engineers & Constructors Inc. performs as the Construction Engineer for Nuclear Projects Nos. 1 and 4. A copy of their report is attached as Exhibit B.

The Supply System has entered into an agreement with Bechtel Power Corporation ("Bechtel") to provide primary construction management services for Nuclear Projects Nos. 1 and 4. These construction management services would replace those of United Engineers and Constructors Inc. who is currently providing both construction management and engineering services. The transfer of responsibility for primary construction management services from United Engineers and Constructors Inc. to Bechtel is scheduled to be complete in June 1981. United Engineers and Constructors Inc. will continue to provide engineering services and certain construction management services for Nuclear Projects Nos. 1 and 4. Under a separate agreement, Bechtel has been retained to provide management services in connection with completion and start-up activities at Nuclear Project No. 2.

Permits and Licenses: The State of Washington has entered into a site certification agreement with the Supply System approving the site and has issued a National Pollutant Discharge Elimination System ("NPDES") permit. The NRC issued a construction permit for Nuclear Project No. 4 on February 21, 1978 under which construction is proceeding. The Supply System has received from the U.S. Army Corps of Engineers a permit to construct cooling water intake and discharge structures in the Columbia River. There are no other major permits required for construction of the Project. Permits relating

to Project operation must be obtained from the NRC and other governmental agencies in the course of placing the Project in operation.

Nuclear Project No. 5

Ownership Agreement: The Supply System and Pacific have entered into an agreement (the "Ownership Agreement") pursuant to which Pacific has purchased 10% of Nuclear Project No. 5. The Ownership Agremeent provides that each party will be responsible for providing its ownership share of the costs of construction and operation and will be entitled to its ownership share of the Project's capability. Under the Ownership Agreement, Pacific has designated the Supply System to act as its agent to construct, operate and maintain the Project.

The Ownership Agreement further provides that if any party is unable to proceed due to inability to finance or obtain necessary legal authorizations, the other party may, under certain conditions, proceed with the Project without the disabled party and the ownership interests will be appropriately adjusted. The Supply System and Pacific have made all payments to date required under the Ownership Agreement.

Location: Nuclear Project No. 5 is located in southeastern Grays Harbor County, Washington, along the south bank of the Chebalis River approximately 1 mile southeast of its confluence with the Satsop River. The site is approximately sixteen miles east of the City of Aberdeen, Washington, and approximately 66 miles southwest of Seatle.

The site is to consist of approximately 2,300 acres, of which approximately 800 will be devoted to the core area upon which Nuclear Project No. 5 and Nuclear Project No. 3 are to be located. The land in the core area has been acquired. Surrounding the core area there is to be approximately 1,500 acres

of land subject to an exclusion zone easement. Easement agreements have been obtained for approximately 85% of this area and easement agreements for the balance are being sought. In addition, the Supply System has acquired the necessary land for railway and road access to the Project and has acquired areas for a barge slip and water intake facilities. A lease of a portion of the bed of the Chehalis River for the water discharge facilities remains to be acquired.

Description: Nuclear Project No. 5 is being designed as a duplicate of Nuclear Project No. 3 and they will share certain facilities. The main plant structures include the reactor containment and shield structure, the reactor auxiliary building, the fuel handling building, the control room area, the turbine-generator building and a 500 foot high natural draft hyperbolic cooling tower. A groundwater intake system will provide the makeup water to replenish the evaporative losses in the cooling tower. The pressurized water nuclear steam supply system, the turbine generator and all associated equipment are sized to give a net generating capabililty of 1,240,000 kilowatts. Emergency power will be supplied to the Project from diesel generators, sized to sustain all essential plant loads without the need for outside power sources.

Status and Schedule: The Supply System had entered into 182 equipment and construction contracts for Nuclear Project No. 5 as of February 1, 1981, including contracts for the nuclear steam supply system with Combustion Engineering, Inc., and for the turbine-generator and accessories with the Westinghouse Electric Corporation. The total amount of these contracts was $936,459,000 as of that date or approximately 61% of the expected total value of all equipment and construction contracts for Nuclear Project No. 5. The reactor building concrete shield wall is complete. Civil construction on the reactor auxiliary building and turbine building is underway. Erec-

tion of the steel reactor containment vessel is underway. As of February 1, 1981, construction of Nuclear Project No. 5 was approximately 11% complete and is scheduled to begin commercial operation in June 1987. However, it is presently expected that commercial operation will be delayed approximately three months because of the labor problems and crane collapse discussed in "Factors Affecting the 1981 Project Construction Budgets and Schedules" under the caption "The Supply System."

The Suppiy System has retained Ebasco Services, Incorporated as the Construction Engineer for Nuclear Projects Nos. 3 and 5. A copy of their report is attached as Exhibit C.

Permits and Licenses: The State of Washington has entered into a site certification agreement with the Supply System approving the site and has issued an NPDES permit. On April 11, 1978 the NRC issued a construction permit for Nuclear Project No. 5 under which construction is proceeding. There are no other major permits required for construction of Nuclear Project No. 5. An operating license must be obtained from the NRC in the course of placing the Project in operation.

Construction Review

As part of its overall management program, the Supply System undertook in November 1980 a study to identify the options available if construction funds were insufficient to maintain optimum construction activity at the Projects. This study will provide the Supply System and its Participants with the ability to value the economic costs of changes in the current schedules. The current evaluation examines the costs of six and twelve month delays in the construction schedules and includes a range of options from reduced activity to a complete shutdown of construction activity.

The preliminary results of the study indicate that any significant delays in completion would result in significantly increased costs of the projects due to additional escalation and capitalized interest costs. The Supply System is not considering the reduction of the contruction activities at the Projects.

* * * * *

Estimated Financing Requirements

The total financing requirements for the Projects, based on the 1981 Projects construction budgets, are estimated to be $7,231,000,000. However, it is presently estimated that the financing requirements will increase by approximately $593,000,000 because of the labor problems, crane collapse and other factors discussed in "Factors Affecting the 1981 Project Construction Budgets and Schedules" under the caption "The Supply System."

The Supply System's current cash flow projections indicate that monies currently available together with investment income thereon and the proceeds from the 1981A and B Bonds will be sufficient to continue construction of the Projects until July 1981. Additional Bonds necessary to complete the financing of the Projects are planned to be issued as the need arises.

Based on the Supply System's 1981 Projects construction budgets, the estimated total financing requirements are shown in the following tabulation:

ESTIMATED FINANCING REQUIRED

	Nuclear Project No. 4	Nuclear Project No. 5 (Supply System's 90% Share)	Total Cost of Projects
Prepurchased Equipment and Construction Contracts(1)	$1,413,122,000	$1,447,221,000	$2,860,343,000
Supply System Controlled Costs(2)	39,163,000	42,681,000	81,844,000
Total Direct Construction Cost	$1,452,285,000	$1,489,902,000	$2,942,187,000
Operational Spare Parts(2)	6,572,000	5,005,000	11,577,000
Sales Tax(3)	72,627,000	77,424,000	150,051,000
Architect-Engineer(1)	112,864,000	102,081,000	214,945,000
Construction Manager(1)	59,934,000	91,506,000	151,440,000
Owner's Costs(2)	168,720,000	155,686,000	324,406,000
Owner's Contingencies(4)	278,200,000	222,300,000	500,500,000
Nuclear Fuel(5)	235,975,000	239,593,000	475,568,000
Total Construction and Fuel Costs	$2,387,177,000	$2,383,497,000	$4,770,674,000
Reserve and Contingency Fund(6)			10,000,000
Working Capital(6)			6,000,000
Reserve Account in the Bond Fund(7)			257,477,000
Bond Discount and Financing Cost(8)			107,604,000
Net Capitalized Interest During Construction (9)			2,063,083,000
Net Requirements			7,214,838,000
Energy and Uranium Bearing Lands Acquisition Programs(10)			16,162,000
Total Financing Required(11)			$7,231,000,000
Estimated Additional Costs(12)			593,000,000
Revised Total Financing Required			$7,824,000,000

(1) Estimated by the Construction Engineers.

(2) Estimated by the Supply System.

(3) Estimated by the Construction Engineers except for sales tax on Supply System Controlled Costs estimated by the Supply System.

(4) Estimated by the Supply System. Includes unallocated contingencies together with related net interest during construction, financing costs and reserves.

(5) Estimated by the Supply System; includes sales tax on the initial core at 5.0% and $113,291,000 for reload fuel for Nuclear Project No. 4 and sales tax on the initial core at 5.2% and $128,500,000 for reload fuel for the Supply System's Ownership Share of Nuclear Project No. 5. Includes amounts which the Supply System estimates will be expended for nuclear fuel for each Project prior to the date of commercial operation.

(6) As required by the Resolution.

(7) An amount equal to the largest semi-annual interest payment on the Bonds, as required by the Resolution. Based on actual annual interest rates for outstanding Bonds through the 1980A Bonds and assumed annual interest rates on the balance of the Bonds ranging from 9.25% to 7.75%. Does not include an allowance for Reserve Account in the Bond Fund identified with the funding of certain Owner's Contingencies.

(8) Based on the actual costs through the 1980A Bonds and an assumed 1.5% for bond discount and financing costs on all issues thereafter. Does not include an allowance for bond discount and financing costs identified with the funding of certain Owner's Contingencies.

(9) Computed as follows based on the same interest rates as in Footnote (7):

Gross Interest During Construction	$2,667,974,000
Estimated Investment Income*	(604,891,000)
Net Interest During Construction**	$2,063,083,000

*Includes actual income to March 1, 1980 and estimated future interest earnings on amounts in the Construction Fund, Reserve and Contingency Fund and the Reserve Account in the Bond Fund.

**Does not include an allowance for the funding of net interest during construction on certain Owner's Contingencies.

(10) Consists of $2,806,000 budgeted for the Energy Program and $13,356,000 budgeted for the Uranium Bearing Lands Acquisition Program.

(11) Based on the Supply System's 1981 Projects' construction budgets.

(12) Identified cost increases discussed under "Factors Affecting the 1981 Project Construction Budgets and Schedules" under the caption "The Supply System".

* * * *

FINANCING PROGRAM

The Supply System has previously obtained $2,050,000,000 of long-term financing for the Projects. After the issuance of the 1981A and B Bonds, based on the 1981 Projects construction budgets the Projects will require additional financing of approximately $4,981,000,000, including capitalized nuclear fuel. However, based upon the additional costs presently identified, it is currently estimated that the financing requirements will increase by approximately $593,000,000.

The Supply System has previously obtained $1,255,000,000 of long-term financing for Nuclear Project No. 1, $1,485,000,000 of long-term financing for Nuclear Project No. 2 and $905,000,000 of long-term financing for its ownership share of Nuclear Project No. 3. Based on the 1981 project construction budgets it is estimated that the Supply System will require additional long-term financing for these projects prior to 1986 of approximately $900,000,000, $501,000,000 and $917,000,000, respectively, for a total of $2,318,000,000. However, based upon the additional costs presently identified, it is currently estimated that the financing requirements will be increased by approximately $528,000,000. The Supply System expects to issue approximately $800,000,000 of bonds for Nuclear Projects Nos. 1, 2 and 3 and approximately $775,000,000 for the Projects during the remainder of 1981.

* * * * *

SUMMARY OF CERTAIN PROVISIONS OF PARTICIPANTS' AGREEMENTS

Each of the Participants has executed a Participants' Agreement with the Supply System. A summary of certain provi-

sions of the Participants' Agreement follows. The full text of the form of these agreements may be obtained from the Supply System.

The capitalization of any word which is not defined herein or not conventionally capitalized (e.g., Annual Budget, Billing Statement) indicates that such word is defined in the Participants' Agreements.

Term

Each Participants' Agreement will terminate on the date both Projects are terminated pursuant to Section 13 thereof, the costs of decommissioning have been paid or provided for, and the principal of, premium, if any, and interest on all Bonds have been paid or funds set aside for the payment or retirement thereof in accordance with the Resolution.

Sale and Purchase

The Supply System sells, and each Participant purchases, its Participant's Share of the Project Capability. The Participants and the amount of each Participant's Share of Project Capability are shown in Exhibit E attached hereto.

Payment

Prior to each Contract Year the Supply System will adopt an Annual Budget covering all the Supply System's costs for the Projects, including debt service on the Bonds. Thereafter a Billing Statement will be prepared for each Participant which will show the amount to be paid to the Supply System by the Participant for the Contract Year. Such amount shall be payable in equal monthly installments and shall be the sum of the Participant's Share of the Annual Budget, less any funds payable

from other sources, and the costs of fuel to be paid by the Participant in accordance with the Participants' Agreements. The Annual Budget and Billing Statements may be amended during a Contract Year if necessary. Payments by the Participants will commence in the month in which occurs the earliest of (i) the first Date of Continuous Operation of a Plant, (ii) July 1988, or (iii) one year after the date of termination of a Project.

Each Participant has convenanted that it will establish, maintain and collect rates or charges for power and energy and other services furnished through its electric utility properties which shall be adequate to provide revenues sufficient to make the required payments to the Supply System. Each Participant is obligated to make such payments to the Supply System, as described above, whether or not the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the Projects' output. No Participant will be required to make such payments to the Supply System except from revenues derived from the ownership and operation of its electric utility properties.

If a Participant which is a municipal corporation defaults under its Participants' Agreement, the Participants' Shares of other municipal corporation Participants will be automatically increased for the remaining term of the Participants' Agreements pro rata up to an additional accumulated maximum of 25% of a Participant's original share of Project Capability. If a Participant which is not a municipal corporation defaults under the Participants' Agreement, the Participants' Shares of other non-municipal corporation Participants will be automatically increased for the remaining term of the Participants' Agreements pro rata up to an additional accumulated maximum of 25% of a Participant's original share of Project Capability.

Licensing, Construction and Operation of the Projects

The Supply System will, among other things, perform its duties and exercise its rights in accordance with Prudent Utility Practice; use its best efforts to arrange for the design, acquisition, construction, operation and maintenance of the Plants and the financing of the Projects; obtain all permits and other rights and regulatory approvals necessary for the financing of the Projects and the design, acquisition, construction, operation and maintenance of the Plants; schedule the Date of Continuous Operation of each Plant as near as possible to March 1982 as to Nuclear Project No. 4, and April 1984 as to Nuclear Project No. 5; and operate and maintain the Plants in accordance with Prudent Utility Practice and the requirements of government agencies having jurisdiction.

Budgets

Construction Budgets and Annual Budgets will be prepared annually by the Supply System and, together with any revisions thereof, are to be submitted to the Participants' Committee. In the absence of any objection by members of such Committee representing 20% or more of the Participants' Shares a budget will become effective within thirty days and any revision thereof will become effective within fifteen days; provided that with respect to Nuclear Project No. 5 approval by Pacific is also obtained to the extent required by the Ownership Agreement.

Costs incurred by the Supply System in an emergency or to protect the safety of any of the Projects or the public shall be added to the Annual Budget as incurred.

Delivery

Deliveries of electric power for the account of each Participant shall be made to the transmission grid of the Federal System operated by Bonneville at the respective points of delivery and at the approximate voltage to be agreed upon by Bonneville and the Supply System, subject to approval of the Participants' Committee. In the absence of such agreement, deliveries to each Participant shall be at the site of the Plants or at a point of delivery agreed to by the Supply System and each Participant.

Bonds for Replacements, Repairs Betterments and Capital Additions

If in any Contract Year the amounts for costs of construction in the Annual Budget for Betterments and Repairs (less the amount of applicable reserves, if any, as provided in the Resolution, plus the proceeds of insurance, if any, available by reason of loss or damage to one or more Projects) exceed by 10% of the Annual Budget less such costs and not including such reserves and insurance proceeds, the Supply System in good faith shall use its best efforts to issue and sell Bonds to pay such excess. Betterments and Repairs is defined as (1) betterments or capital additions necessary to achieve design capability, to improve operating reliability or to reduce unit power costs or required by governmental agencies and (ii) replacements or repairs, the aggregate cost of which exceeds $3,000,000.

Participants' Committee

A Participants' Committee of not less than two nor more than seven entities or persons is to be elected by the Participants. [The Participants' Committee has been formed with

seven members.] The election of committee members is to take place every third year. Each committee member is entitled to a vote equal to the Participants' Shares of the Participants who designate such member to represent their shares.

Participants' Committee Approval and Project Consultant

If any proposal subject to approval by the Participants' Committee (including proposed Bond Resolutions, Annual Budgets and the Construction Budgets) is disapproved by such Committee, or upon receipt by the Supply System of a proposal by Participants' Committee members representing 20% or more of the Participants' Shares or a proposal by Pacific pursuant to the Ownership Agreement, the Supply System shall call a meeting of the Participants' Committee and, if appropriate, Pacific. If at such meeting any Supply System proposal is approved by Committee members representing 80% or more of the Participants' Shares and, if appropriate, by Pacific, the Supply System proposal shall be deemed approved. If such approval is not so obtained, then the Supply System, Participants' Committee members representing 20% or more of the Participants' Shares or, if appropriate, Pacific, may submit one or more proposals to the Project Consultant for review. The Project Consultant shall be selected by agreement of the Supply System, Participants' Committee members representing 20% or more of the Participants' Shares and, if appropriate, Pacific. Supply System proposals found by the Project Consultant to be consistent with Prudent Utility Practice shall become immediately effective. If the Project Consultant determines the Supply System's proposal is not in accordance with Prudent Utility Practice and if it finds a proposal of the Committee members, or Pacific, is in accordance

with Prudent Utility Practice, the Supply System shall proceed with such proposal. If the Project Consultant determines that none of the proposals conform with Prudent Utility Practice, it shall dismiss all proposals.

If any proposal referred to the Project Consultant has not been resolved and will affect the continuous operation of a Project, the Supply System shall continue to operate the Project.

Items subject to the approval of the Participants' Committee include, but are not limited to:

Construction and Annual Budgets and Fuel Plan, and changes therein.

Award of any contract or approval of any change order, in either case in excess of $2,000,000, or such other contracts as determined by the Participants' Committee.

Estimates of costs of repair of damage to a Project if in excess of $5,000,000, recommendation whether to repair in whole or in part or to remove from service and construction budget for repair of Project.

Proposed Bond Resolutions.

Any proposal made by Participants' Committee members representing Participants' Shares voting rights of 20% or more.

Construction or acquisition of Nuclear Project No. 5, in the event Pacific is unable to proceed as an owner.

Repair of damage to Nuclear Project No. 5 exceeding 20% of depreciated value.

Increase in the Supply System's ownership interest in Nuclear Project No. 5.

[The Participants' Committee has approved the Resolution and the Supplemental Resolutions.]

* * * *

Termination

Section 13 of the Participants' Agreements provide that Nuclear Project No. 4 shall be terminated and the Supply System shall cause it to be salvaged, discontinued, decommissioned, and disposed of when:

> (a) the Supply System determines that it is unable to construct, operate or proceed as owner of such Project due to financing, licensing, construction or operating conditions or other causes which are beyond its control;
>
> (b) the Supply System, with the written concurrence of members of the Participants' Committee representing two-thirds or more of the Participants' Shares of Project Capability determines that such Project is not capable of producing energy consistent with Prudent Utility Practice; or
>
> (c) if the estimated aggregate costs of Betterments and Repairs for a Plant exceed 20% of the then depreciated value of the Plant, members of the Participants' Committee representing 80% or more of the Participants' Shares direct that the Supply System end such Project.

Section 13 also provides that Nuclear Project No. 5 shall terminate, subject to the Ownership Agreement, in substantially the same manner as Nuclear Project No. 4.

After termination of a Project, the Supply System shall undertake the decommissioning of such Project and shall make monthly accounting statements to the Participants of all costs associated therewith. Such monthly accounting statements shall continue until such Project has been salvaged, discontinued, or finally disposed of, at which time a final accounting

statement shall be made by the Supply System. The cost of decommissioning shall include, but shall not be limited to, all of the Supply System's costs and liabilities resulting from the Supply System's ownership, construction, operation and maintenance of and renewals and replacements to such Project, and the costs of salvage, discontinuance and disposition or sale thereof.

Upon termination of both of the Projects, the Supply System shall make monthly accounting statements to the Participants until all Bonds have been paid or funds set aside for the payment or retirement thereof, in accordance with the Resolution.

Modification of Agreement

The Participants' Agreements shall not be amended, modified, or otherwise changed by the agreement of the parties thereto in any manner that will impair or adversely affect the security afforded by the provisions of the agreements for the payment of the principal, interest, and premium, if any, on the Bonds.

SUMMARY OF CERTAIN PROVISIONS OF THE RESOLUTION AND SUPPLEMENTAL RESOLUTIONS

The following summary is a brief outline of certain provisions contained in the Resolution and the Supplemental Resolutions and is not to be considered as a full statement thereof. The summary is qualified by reference to and is subject to the Resolution and the Supplemental Resolution, copies of which may be examined at the principal offices of the Supply System, the Bond Fund Trustee and the Paying Agents for the Bonds. The capitalization of any word which is not defined herein or

conventionally capitalized (e.g., Date of Continuous Operation) indicates that such word is defined in the Resolution.

The Bonds

The Resolution creates an issue of Bonds of the Supply System which may be issued from time to time to pay the Cost of Construction of the Projects, to provide working capital, to establish reserves, to pay the principal of and interest on the Development Bonds and to finance certain work in connection with the evaluation and development of future energy resources and alternatives and the acquisition of uranium bearing lands through transfers of amounts to the Development Fund and Fuel Development Fund as hereafter described. The 1981A and B Bonds are part of such issue.

The Supply System covenants to issue additional series of Bonds to the extent required to pay the Cost of Construction of the Projects, to pay the principal of and interest on the Development Bonds, to provide working capital and to establish the reserves required by the Resolution to be established with Bond proceeds. Additional Bonds may be issued upon compliance with the following principal conditions:

(1) Delivery to the Supply System of a certificate of the Bond fund Trustee that no default exists in the payment of principal of and interest on any outstanding Bond (or that any such default will be cured by application of the proceeds of such additional Bonds) and the delivery to the Bond Fund Trustee of a certificate of the Supply System to the same effect and also that the Participants' Agreements manner adversely affecting the Supply System and the holders of the Bonds.

(2) Delivery to the Bond Fund Trustee and the Supply System of a certificate of the Construction Engineer

for each Project setting forth his then current estimate of the Cost of Construction of such Project, exclusive of amounts required for the Reserve Account, the Reserve and Contingency Fund, working capital, capitalized interest and Bond issuance expenses, and the times funds will be required to pay such Cost, and, if such Cost of Construction has increased, stating the reasons for such increase. The Construction Engineers may rely upon estimates of the Supply System of owner's costs, including Capitalized Fuel, sales taxes and administrative expenses, and owner's contingencies. (Res. Secs. 3.1, 3.3).

Application of Bond Proceeds

From the proceeds of sale of each series of Bonds there shall be deposited:

(a) With the Bond Fund Trustee for credit to the Interest Account in the Bond Fund such amount as the Supply System determines should be credited thereto to provide for the payment of interest accruing on Bonds before July 1, 1988 which will not be provided from revenues pursuant to the Participants' Agreements;

(b) With the Bond Fund Trustee for credit to the Reserve Account in the Bond Fund an amount equal to the largest amount of interest accruing on such series of Bonds during any six month period;

(c) With the Supply System for deposit in the Reserve and Contingency Fund an amount at least equal to 1% of the principal amount of such series of Bonds until there shall be $10,000,000 on deposit in such Fund;

(d) With the Supply System for deposit in the Revenue Fund such amount as the Supply System determines is required for working capital; and

(e) With the Supply System for credit to the Construction Fund, the balance of such proceeds. (Res. Sec. 6.8).

Construction Fund: The Resolution establishes a Construction Fund which is to be held by the Supply System and used to pay the Cost of Construction of the Projects, which includes all the Supply System's costs of constructing and acquiring the Projects, costs of Fuel for each Project which are payable before the Date of Continuous Operaration thereof, working capital for Fuel and the deposits from Bond proceeds referred to above. The costs of Fuel may include the cost of acquiring uranium bearing lands and mining, milling and processing the uranium resources thereof. The Resolution requires the Construction Engineeers to certify amounts to be paid for work and materials within the scope of their responsibility prior to payment or transfer of amounts therefor from the Construction Fund. Up to $95,000,000 may also be transferred from the Construction Fund to the Development Fund and the Fuel Development Fund as explained below. (Res. Secs. 6.9, 6.10).

Development Fund; Fuel Development Fund: The Resolution also establishes a Development Fund and Fuel Development Fund, which are to be held by the Supply System and to which the Supply System may transfer from time to time from the Construction Fund up to $50,000,000 and $45,000,000, respectively. The Development Fund shall be used to pay the cost of studies to enable the Participants to determine the best method of serving their prospective power and energy needs and the cost of work to establish the feasibility of specific energy resources, including the cost of options

on equipment, fuel and land. The Fuel Development Fund shall be used to pay the cost of the acquisition of uranium bearing lands, including the identification thereof, and the cost of preliminary work to establish the feasibility of the mining, milling and processing of uranium from such lands. (Res. Secs. 6.12, 6.13).

Additional Obligations

The Supply System may also issue additional obligations ranking on a parity with the Bonds and secured by an equal charge and lien on the revenues of the Projects (''additional bonds'') for the following purposes:

(1) to comply with any order or decision of any governmental agency with authority to issue or make and enforce and order or decision requiring the installation of additional facilities or modifications at or in a Project;

(2) to pay for replacements, repairs and betterments to a Project and for capital additions and betterments thereto necessary to achieve design capability or required by any governmental agency or authority;

(3) to provide funds for capital additions and betterments to a Project which in the opinion of the Consulting Engineer are necessary or desirable to improve operating reliability or to reduce unit power costs;

(4) to pay costs of Fuel for the Projects which may include the cost of acquiring uranium bearing lands and mining, milling and processing the uranium resources thereof;

(5) to provide funds for deposit in the Development Fund and Fuel Development Fund to the extent Bond

proceeds deposited therein are less than $50,000,000 and $45,000,000, respectively; and

(6) to refund at any time any Bonds or additional bonds.

The Supply System may not issue any additional bonds unless prior to or simultaneously with the issuance of such bonds the Supply System has in effect valid written contracts for the sale of the power and energy of the Projects which, in the opinion of the Supply System and of the Consulting Engineer, will produce revenues at least sufficient to enable the Supply System to meet all of its obligations under the Resolution. Such contracts (i) must be for terms extending at least to the final maturity date of the additional bonds then being issued, (ii) must in the opinion of the Consulting Engineer provide a sound basis for the issuance of such additional bonds and (iii) must contain terms with respect to payments for the Projects' power and energy and the items of annual power costs to be included in the price for such power and energy which are no less favorable to the Supply System than the terms of the Participants' Agreements.

Additional bonds may be either serial or term bonds or a combination thereof with the final maturity date (i) of such bonds issued for the purposes provided in clauses (1), (2) and (3) above to be no later than the expiration of the service life of the facilities financed from the proceeds of sale of such bonds; (ii) of such bonds issued for the purpose provided in clause (4) above to be no later than the expected latest service life of any Project; (iii) of such bonds issued for the purposes provided in clause (5) above to be no later than the final maturity date of the last maturing Bonds or additional bonds then outstanding; and (iv) of such bonds issued for the purposes provided in clause (6) above to be no later than the later of (a) the final maturity date of the Bonds or additional bonds

being refunded or (b) the expiration of the service life of the facilities financed from the proceeds of sale of the Bonds or additional bonds being refunded or, in the case of additional bonds issued to refund Bonds or additional bonds issued for the purchase or Fuel, the expiration of the service life of the Projects.

A separate bond fund is to be created for each issue of additional bonds and payments into such bond fund for the retirement of such bonds are to commence within 5 years from the date thereof, or, in the case of refunding bonds, at the time when payments with respect to the retirement of the refunded Bonds or additional bonds would be required if such Bonds or additional bonds were not refunded or, in the case of additional bonds issued for the purchase of Fuel, at any time determined by the Supply System. From the proceeds of sale of additional bonds or revenues of the Supply System available at the time of issuance, an amount equal to the maximum amount of interest to become due on such bonds in any six-month period is to be deposited in the reserve account in such bond fund, and such account is to be maintained at such amount; provided that such amount, in the case of refunding bonds, may be so deposited at the time when the refunded bonds are no longer deemed outstanding and may be accomplished at that time from transfers from the Reserve Account for the Bonds or the reserve account for the additional bonds being refunded, as the case may be. (Res. Sec. 9.6).

* * * * *

Certain Covenants

Certain covenants of the Supply System with the holders of the Bonds and additional bonds are summarized as follows:

The Projects: The Supply System will, subject to the Participants' Agreements and the Ownership Agreement, complete construction of the Projects at the earliest practicable time, operate them and the business in connection therewith in an efficient manner and at reasonable cost, maintain them in good condition and make all necessary and proper repairs, renewals, replacements, additions, extensions and betterments thereto. (Res. Sec. 9.1).

Construction Engineer: The Supply System will continuously retain its present Construction Engineer, or some other construction engineer or engineering firm of national reputation as the Construction Engineer, for each Project. Among its duties as Construction Engineer are to: (a) prepare drawings, designs, plans, specifications, surveys and reports as are necessary for proper construction, (b) prepare and submit to the Supply System, the Bond Fund Trustee and requesting Bondholders, quarterly reports of construction progress, (c) continuously supervise and inspect construction; ***provided that*** the Supply System may retain another engineering firm of like qualifications to perform such supervision and inspection, or may perform such duties itself, and (d) certify that a Project is ready for normal continuous operation. (Res. Secs. 8.1, 8.3).

Rates: The Supply System will dispose of all power and energy from the Projects solely for the benefit and account of the Projects and pursuant to the provisions of the Participants' Agreements, and the Supply System will maintain and collect rates and charges for power and energy and other services, facilities and commodities sold, furnished or supplied through the Projects, which will be adequate, whether or not the generation or transmission of power by the Projects is suspended, interrupted or reduced for any reason whatever, to provide revenues sufficient among other things (i) to pay the expenses of operating and maintaining the Projects, (ii)

to make the required payments into the Bond Fund and any bond funds for additional bonds, and (iii) to make the required payments into the Fuel Fund, Reserve and Contingency Fund and Extraordinary Reserve Fund. (Res. Secs. 9.2, 9.3).

Participants' Agreements and Ownership Agreement: The Supply System will not voluntarily consent to any amendment or permit any rescission of or take any action under or in connection with the Participants' Agreements or Ownership Agreement which will in any manner impair or adversely affect the rights of the Supply System or of the Bondholders and will not take any action under or in connection with the Participants' Agreements which will reduce the payments provided for therein. (Res. Sec. 9.4).

Disposition of Properties: The Supply System will not sell, mortgage, lease or otherwise dispose of any properties of the Projects unless (a) simultaneous provision is made for the retirement in full of the Bonds and any additional bonds, (b) the properties to be disposed of are unserviceable, inadequate, obsolete or no longer required for use in connection with the Projects, in which case $100,000 of the moneys received therefor are to be transferred to the Reserve and Contingency Fund and the balance is to be paid proportionately into the Bond Retirement Account and bond retirement accounts created for additional bonds, except that all moneys received from any such disposition in connection with the replacement of properties are to be transferred to the Reserve and Contingency Fund, (c) in the case of Fuel, which may be disposed of for a price not less than the lesser of the cost to the Supply System thereof or the fair market value thereof at the time of disposition, the proceeds of such disposition are paid into the Fuel Fund or proportionately into the Bond Retirement Account and bond retirement accounts for additional bonds, (d) the transfer of such properties in whole or in part

is by operation of law, in which case moneys received therefor are to be paid proportionately into the Bond Retirement Account and bond retirement accounts for additional bonds or (e) the disposition of such properties is in connection with the termination of a Project pursuant to the Participants' Agreements, in which case moneys received therefor may be applied to decommissioning costs or used to retire Bonds and additional bonds. Notwithstanding clauses (b), (c), (d) and (e) above, moneys received by the Supply System prior to the Date of Continuous Operation of both Projects as a result of any sale, lease, transfer or other disposition of properties specified in such clauses may be transferred to the Construction Fund. (Res. Sec. 9.7).

Insurance: The Supply System will keep the properties of the Projects insured, to the extent such insurance is available at reasonable cost: against risk of direct physical loss or damage to or destruction of such properties, accidents, casualties, or negligence, including liability insurance and employer's liability at least to the extent that similar insurance is usually carried by private utility corporations operating like properties.

In the event of loss or damage to the properties of any Project covered by such insurance, the Supply System is to transfer the insurance proceeds, if any, in respect of such loss or damage to the Construction Fund if received during the Period of Construction of such Project, and any insurance prodeeds received thereafter by the Supply System in respect of such loss or damage are to be transferred into the Reserve and Contingency Fund; provided in the case of insurance covering loss or damage to Fuel the insurance proceeds, if any, in respect of such loss or damage shall be deposited in the Construction Fund if received prior to the Date of Continuous Operation of such Project or in the Fuel Fund if received thereafter. (Res. Sec. 9.8).

Books of Account:

The Supply System's books of account are to be audited annually by a firm of independent certified public accountants of national reputation. The annual financial statements showing the financial condition of the Projects and the annual audit report will be filed with the Bond Fund Trustee and sent to Bondholders filing with the Supply System a written request therefor. (Res. Sec. 9.9).

Consulting Engineer: The Supply System will retain a nationally recognized independent consulting engineer engineering firm to render continuous engineering counel with respect to the Projects. In addition to its other duties, the Consulting Engineer shall prepare, not later than 18 months after the Date of Continuous Operation of each Project, and each 3 years thereafter, a report based upon an examination of such Project and a survey of the management, operation and maintenance thereof. Each report is to show, among other things, whether the Supply System has satisfactorily performed and complied with certain covenants in the Resolution. The Consulting Engineer is also required to report to the Bond Fund Trustee and the Supply System upon the economic soundness and feasibility of all contemplated renewals, replacements, additions, betterments and improvements to and extensions of the Projects involving the expenditure of $500,000 or more. The Consulting Engineer is also required to file annually a certificate with the Bond Fund Trustee describing the insurance then in effect and stating whether or not such insurance complies with the requirements of the Resolution. In the event of any loss or damage in excess of $500,000, whether or not covered by insurance, the Consulting Engineer is to ascertain the amount of such loss or damage and deliver to the Supply System a certificate setting forth the amount and nature of such loss or damage, together with

recommendations as to whether or not such loss or damage should be replaced or repaired. Copies of any such triennial report, annual certificate as to insurance, or certificate in respect of any such loss or damage will be sent to Bondholders filing with the Supply System written requests therefor. (Res. Secs. 9.8, 9.10).

Events of Default; Remedies

Under the Resolutions, the happening of one or more of the following events constitutes an Event of Default: (i) default in the performance of any obligation with respect to payments into the Revenue Fund; (ii) default in the payment of the principal of or interest on any Bonds; (iii) default for 90 days after written notice to the Supply System in the observance and performance of any other of the covenants, conditions and agreements of the Supply System in the Resolution; (iv) the sale or conveyance of any properties of the Projects except as permitted by the Resolution or the voluntary forfeiture of any license, franchise, permit or other privilege necessary or desirable in the operation of the Projects; and (v) certain events in connection with the bankruptcy, insolvency or reorganization of the Supply System. (Res. Sec. 11.1).

In case an Event of Default has occurred which has not been curred, the Bond Fund Trustee is required to exercise such of the rights and powers vested in it by the Resolution and use the same degree of care and skill in the exercise thereof as a prudent man would exercise or use under the circumstances in the conduct of his own affairs. (Res. Sec. 7.6).

If an Event of Default shall have occurred, and shall not have been remedied, the Bond Fund Trustee or the holders of 20% in principal amount of the Bonds and additional bonds then outstanding may declare the principal of all Bonds and addi-

tional bonds and the interest accrued thereon to be immediately due and payable, but such declaration may be annulled under certain circumstances. (Res. Sec. 11.1).

After the occurrence of an Event of Default and prior to the curing of such Event of Default, the Bond Fund Trustee may, to the extent permitted by law, take possession and control of the Projects and operate and maintain the same, prescribe rates for capability or power sold or supplied through the facilities of the Projects, collect the gross revenues resulting from such operation and perform all of the agreements and covenants contained in any contract which the Supply System is then obligated to perform. Such gross revenues, after payment of operation and maintenance expenses and certain administrative expenses incurred by reason of default, shall be applied to the payment of principal of and interest on the Bonds and additional bonds. After all sums then due in respect of the Bonds and additional bonds have been paid, and after all Events of Default have been cured or secured to the satisfaction of the Bond Fund Trustee, the Bond Fund Trustee is required to relinquish possession and control of the Projects to the Supply System (Res. Secs. 11.3, 11.4).

The Resolution empowers the Bond Fund Trustee to file proofs of claims for the benefit of Bondholders in bankruptcy, insolvency, or reorganization proceedings and to institute suit for the collection of sums due and unpaid in connection with the Bonds, to enforce specific performance of covenants contained in the Resolution or to obtain injunctive or other appropriate relief for the protection of the Bondholders. (Res. Sec. 11.4).

The holders of a majority in principal amount of the Bonds and additional bonds at the time outstanding have the right to direct the time, method and place of conducting any pro-

ceeding for any remedy available to the Bond Fund Trustee, or exercising any trust or power conferred upon the Bond Fund Trustee, but the Bond Fund Trustee must be provided with reasonable security and indemnity and also may decline to follow any such direction if it shall be advised by counsel that the action or proceeding so directed may not lawfully be taken or if it in good faith determines that the action or proceeding so directed would involve it in personal liability or that the action or proceeding so directed would be unjustly prejudicial to the holders of Bonds or additional bonds not parties to such direction. No holder of Bonds or additional bonds has any right to institute suit to enforce any provision of the Resolution or the execution of any trust thereunder (except to enforce the payment of principal or interest installments as they mature), unless the Bond Fund Trustee has been requested by the holders of not less than 20% in principal amount of the Bonds and additional bonds then outstanding to exercise the powers granted it by the Resolution or to institute such suit and unless the Bond Fund Trustee has refused or failed, within 60 days after the receipt of such request and after having been offered adequate security and indemnity, to comply with such request. In the event the Bond Fund Trustee has failed or refused to comply with the aforesaid request, the Resolution provides for the creation of a "Bondholders' Committee" empowered to exercise the rights and powers of the Bond Fund Trustee relating to defaults and remedies under the Resolution. (Res. Secs. 11.4, 11.5).

Amendments; Supplemental Resolutions

Any amendment to the Resolution may be made by the Supply System with the consent of the holders of 66⅔% in principal amount of the Bonds and additional bonds then outstanding and with the consent of the holders of 66⅔% in

principal amount of the outstanding Bonds and additional bonds which are adversely affected by an amendment which does not equally affect all such outstanding Bonds and additional bonds, provided that so such amendment shall permit a change in the date of payment of principal of or any installment of interest on any Bond or additional bond or a reduction in the principal or redemption price thereof or the rate of interest thereon with the consent of each holder of Bonds or additional bonds so affected. (Res. Article XII).

Without the consent of any holder of Bonds or additional bonds, the Supply System may adopt supplemental resolutions to authorize the issuance of subsequent series of Bonds or additional bonds; to add to the covenants of the Supply System contained in, or to surrender any rights reserved to or conferred upon it by, the Resolution; to add to the restrictions contained in the Resolution upon the issuance of additional indebtedness; to confirm as further assurance any pledge under the Resolution of the revenues of the Projects or other moneys; to otherwise modify any of the provisions of the Resolution (but no such modification may be effective while any of the Bonds or additional bonds therefore issued are outstanding); or to cure any ambiguity or defect or inconsistency in the Resolution, or to insert such provisions clarifying matters or questions arising under the Resolution as are necessary or desirable and either not adverse to the rights and interests of the Bondholders or not contrary to or inconsistent with the Resolution, provided that the Bond Fund Trustee shall consent thereto. (Res. Article X).

* * * * *

LEGAL OPINIONS

Wood & Dawson, New York, New York, Bond Counsel to the Supply System, and Houghton Cluck Coughlin & Riley,

Seattle, Washington, Special Counsel to the Supply System, will render opinions with respect to the validity of the 1981A and B Bonds, the Participants' Agreements and the Ownership Agreement. The forms of the opinions they propose to render are appended hereto as Exhibit D.

TAX EXEMPTION

In the opinion of the above named Counsel, the interest on the 1981A and B Bonds will be exempt from federal income taxation under existing laws and regulations.

A copy of the proposed opinion of Wood & Dawson with respect to the exemption from Federal income taxation of amounts attributable to original issue discount on the 1981A Bonds maturing on July 1, 2011, is also contained in Exhibit D.

CERTIFICATE AS TO OFFICIAL STATEMENT

The Supply System will confirm to the successful bidders for the 1981A and B Bonds, by certificates of the Supply System dated and deliverd on the date of delivery of and payment for the 1981A and B Bonds, that on the date of this Official Statement and on the date of the certificate (i) the descriptions and statements of or pertaining to the Supply System contained in this Official Statement were and are true and correct in all materials respects; (ii) insofar as the Supply System and its affairs, including its financial affairs, are concerned, this Official Statement did not and does not contain an untrue statement of a material fact or omit any statement or information which is necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading; and (iii) insofar as the descriptions and statements, including financial data, of or pertaining to other bodies and their activities contained in

this Official Statement are concerned, such descriptions, statements and data have been obtained from sources which the Supply System believes to be reliable and the Supply System has no reason to believe that they are untrue in any material respect.

RATINGS

As noted on the cover page of this Official Statement, Moody's Investors Service, Inc. and Standard & Poor's Corporation have respectively given ratings of A1, and A+, to the 1981A and B Bonds. Ratings were applied for by the Supply System and certain information was supplied by the Supply System to the rating agencies to be considered in evaluating the 1981A and B Bonds. The ratings reflect only the respective views of the rating agencies, and an explanation of the significance of the ratings may be obtained only from the rating agency furnishing the same. There is no assurance that either or both of the ratings will be retained for any given period of time or that the same will not be revised downward or withdrawn entirely by the rating agency furnishing the same if, in their judgment, circumstances so warrant. Any such downward revision or withdrawal of the ratings, or either of them, may have an adverse effect on the market price of the 1981A and B Bonds.

MISCELLANEOUS

The references, excerpts, and summaries contained herein of the Participants' Agreements, Ownership Agreement, Assignment Agreements, Short Term Sales Agreement and the Resolution do not purport to be complete statements of the provisions of these documents and reference should be made to these documents for a full and complete statement of all matters relating to the 1981A and B Bonds, the basic agreements securing the 1981A and B Bonds and the rights

and obligations of the holders thereof. Copies of these documents are available upon request at the office of the Supply System in Richland, Washington.

The authorizations, agreements and covenants of the Supply System are set forth in the Resolution, and neither this Official Statement nor any advertisement of the 1981A and B Bonds are to be construed as a contract with the holders of the 1981A and B Bonds. Any statements made in this Official Statement involving matters of opinion or of estimates, whether or not expressly so identified are intended merely as such and not as representations of fact.

The Consulting Engineer has furnished the information contained under the captions "Power Supply in the Pacific Northwest" and "The Participants", and in "Estimated Annual Cost of Power" and "Extraordinary Reserve Fund" under the caption "Nuclear Projects Nos. 4 and 5".

The delivery of this Official Statement has been duly authorized by the Supply System.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM

By HOWARD PREY
Assistant Secretary

EXHIBIT A

R.W. Beck and Associates

ENGINEERS AND CONSULTANTS

TOWER BUILDING
7TH AVENUE AT OLIVE WAY
SEATTLE, WASHINGTON 98101
206-662-5000

206-622-5000

March 17, 1981

Board of Directors
WASHINGTON PUBLIC POWER SUPPLY SYSTEM
POST OFFICE BOX 968
RICHLAND, WASHINGTON 99352

Gentlemen:

Subject: *Consulting Engineer's Report*
Washington Public Power Supply System
Generating Facilities (Nuclear Projects Nos. 4 and 5)

Present herewith are the results of our analyses, investigations and studies with respect to the proposal by the Washington Public Power Supply System (the "Supply System") to issue $200,000,000 aggregate principal amount of its Generating Facilities Revenue Bonds, Series 1981A and Series 1981B (Nuclear Projects Nos. 4 and 5) (the "1981A and B Bonds"), for the purpose of paying a portion of the costs of the acquisition and construction of a 1,250,000 kilowatt nuclear-fueled electric generating plant known as Washington Public Power Supply System Nuclear Project No. 4 ("Nuclear Project No. 4") and a 90% ownership interest in a 1,240,000 Kilowatt nuclear-fueled electric generating plant known as Washington Public Power Supply System Nuclear

Project No. 5 ("Nuclear Project No. 5"), together referred to herein as the "Projects".

In addition to $100,000,000 of Development Bonds which have been retired or refunded from previous issues of Bonds, the Supply System has issued $2,050,000,000 of its Generating Facilities Revenue Bonds for the Projects. The Supply System's financing program for the Projects provides that additional bonds (which together with the 1981A and B Bonds and fourteen previously issued series of Generating Facilities Revenue Bonds, Series 1977A through 1980E, are hereinafter referred to as the "Bonds") will be issued at later dates and in amounts necessary to pay the costs of completing and placing the Projects into operation. Based on the Supply System's 1981 Projects construction budgets, the estimated total amount of Bonds issued and expected to be issued is $7,231,000,000. This does not include approximately $593,000,000 of cost increases identified since the 1981 Projects' construction budgets were prepared. See the caption "The Supply System".

The capability of the Projects has been sold by the Supply System, pursuant to Participants' Agreements, to 24 districts, 21 municipalities and 43 electric cooperatives (the "Participants") which are statutory preference customers of the Bonneville Power Administration ("Bonneville"). The districts, municipalities and cooperatives, all of which are located in the Pacific Northwest, have contracted to purchase approximately 58.3%, 20.2% and 21.5%, respectively, of the capability of the Projects. The output of the Projects is proposed to be delivered to the Participants at the points of interconnection between facilities of the Projects and the Bonneville transmission system.

The Supply System has entered into the Nuclear Project No. 5 Ownership Agreement dated July 14, 1976 with the Pacific Power & Light Company ("Pacific") which agreement

provides for the acquisition, construction, operation and ownership as tenants in common of Nuclear Project No. 5, with Pacific owning 10% and the Supply System owning 90%.

* * * * *

THE PROJECTS

Nuclear Project No. 4

Nuclear Project No. 4 will consist of a pressurized-water nuclear electric generating plant having a net generating capability of approximately 1,250,000 kilowatts and associated facilities and is located adjacent to Nuclear Project No. 1 within the Hanford Reservation in Benton County, Washington, about 12 miles north of the City of Richland, Washington.

The Supply System has received site certification and a National Pollutant Discharge Elimination System permit from the State of Washington for both Nuclear Project No. 1 and Nuclear Project No. 4. Construction for Nuclear Project No. 4 started in August 1975 under a limited work authorization issued by the United States Nuclear Regulatory Commission ("NRC"). The NRC issued a construction permit for Nuclear Project No. 1 on December 23, 1975 and for Nuclear Project No. 4 on February 21, 1978.

The schedule used in the 1981 project construction budget for Nuclear Project No. 4 is designed to follow the schedule for Nuclear Project No. 1 by 12 months. The Nuclear Project No. 1 commercial operation date is currently scheduled for June 1985. Accordingly, the currently scheduled commercial operation date for Nuclear Project No. 4 is June 1986. However, it is presently estimated by the Supply System that commercial opera-

tion of each project will be delayed eight months because of the labor problems discussed under the caption "The Supply System".

The Supply System has entered into contracts for the nuclear steam supply system, including the fabrication of the initial core of nuclear fuel, with the Babcock and Wilcox Company and for the turbine-generator with the Westinghouse Electric Corporation. These contracts, plus other contracts already entered into for Nuclear Project No. 4, provide for the acquisition of equipment and services with a total cost of $726,766.519 as of February 1, 1981.

The Supply System has entered into an agreement with Bechtel Power Corporation to provide primary construction management services for Nuclear Projects Nos. 1 and 4. These construction managment services would replace those of United Engineers and Constructors Inc., which is currently providing both construction management and engineering services. The transfer of responsibility for the primary construction management services from United Engineers and Constructors Inc. to Bechtel is scheduled to be complete in June 1981. United Engineers and Constructors Inc. will continue to provide engineering services and certain construction management services for Nuclear Projects Nos. 1 and 4. Under a separate agreement, Bechtel has been retained to provide management services in connection with completion and start up activities at Nuclear Project No. 2.

The following table shows the Supply System's 1981 project construction budget estimate of construction costs for Nuclear Project No. 4 but does not reflect the cost increases discussed under the caption "The Supply System":

Nuclear Project No. 4

Prepurchased Equipment and Construction Contracts(1)	$1,413,122,000
Supply System Controlled Costs(2)	39,163,000
Total Direct Construction Costs	$1,452,285,000
Operational Spare Parts(2)	6,572,000
Sales Tax(3)	72,627,000
Architect-Engineer(1)	112,864,000
Construction Manager(1)	59,934,000
Owner's Costs(2)	168,720,000
Owner's Contingencies(4)	278,200,000
Nuclear Fuel(5)	235,975,000
Total Construction and Fuel Costs (6)	$2,387,177,000

(1) Estimated by the Construction Engineer.

(2) Estimated by the Supply System.

(3) Estimated by the Construction Engineer except for sales tax on Supply System Controlled Costs estimated by the Supply System.

(4) Estimated by the Supply System. Includes unallocated contingencies together with related net interest during construction, financing costs and reserves.

(5) Estimated by the Supply System; includes sales tax at 5.0% on the intial core and $113,291,000 for reload fuel.

(6) Based on a commercial operation date of June 1986.

Nuclear Project No. 5

Nuclear project No. 5 will consist of a pressurized-water nuclear electric generating plant having a net generating capability of approximately 1,240,000 kilowatts and associated facilities. The plant will be located adjacent to Nuclear Project No. 3 in Grays Harbor County, about three miles south of Satsop, Washington, and about 16 miles east of Aberdeen, Washington.

The Supply System has received site certification and a National Pollutant Discharge Elimination System permit from the State of Washigton and received a limited work

authorization on April 8, 1977 from the NRC. Preliminary site work for Nuclear Project No. 3 and Nuclear Project No. 5 commenced in April 1977, and major excavation activities started in June 1977. The Supply System received construction permits from the NRC for Nuclear Project No. 3 and Nuclear Project No. 5 on April 11, 1978.

The schedule used in the 1981 project construction budget for Nuclear Project No. 5 is designed to follow the schedule for Nuclear Project No. 3 by approximately 12 months. The Nuclear Project No. 3 commercial operation date is currently scheduled for June 1986. Accordingly, the currently scheduled commercial operation date for Nuclear Project No. 5 is June 1987. However, it is presently estimated by the Supply System that the commercial operation date of each project will be delayed three months because of the labor problems and crane collapse discussed under the caption "The Supply System."

The Supply System has employed Ebasco Services, Incorporated as the Construction Engineer for both Nuclear Project No. 3 and Nuclear Project No. 5. The Supply System has entered into contracts for the nuclear steam supply system, including fuel fabrication for the initial core loading of nuclear fuel, with Combustion Engineering, Inc., and for the turbine-generator with the Westinghouse Electric Corporation. These contracts, plus other contracts already entered into for Nuclear Project No. 5, provide for the acquisition of equipment and service with a cost of $936,459,000 as of February 1, 1981.

The following table shows the Supply System's 1981 project construction budget estimate of construction costs for Nuclear Project No. 5 but does not reflect the cost increases discussed under the caption "The Supply System":

Nuclear Project No. 5

	Total Project	Supply System's 90% Share
Purchased Equipment and Construction Contracts(1)	$1,608,024,000	$1,447,221,000
Supply System Controlled Costs(2)	47,423,000	42,681,000
Total Direct Construction Costs	$1,655,447,000	$1,489,902,000
Operational Spare Parts(2)	5,561,000	5,005,000
Sales Tax(3)	86,027,000	77,424,000
Architect-Engineer(1)	113,424,000	102,081,000
Construction Manager(1)	101,673,000	91,506,000
Owner's Costs(2)	172,984,000	155,686,000
Owner's Contingencies(4)	247,000,000	222,300,000
Nuclear Fuel	266,214,000	239,593,000(5)
Total Construction and Fuel Costs(6)	$2,648,330,000	$2,383,497,000

(1) Estimated by the Construction Engineer.

(2) Estimated by the Supply System.

(3) Estimated by the Construction Engineer except for sales tax on Supply System Controlled Costs estimated by the Supply System.

(4) Estimated by the Supply System. Includes unallocated contingencies together with related net interest during construction, financing costs and reserves.

(5) Estimated by the Supply System; includes sales tax at 5.2% on the initial core and $128,500,000 for reload fuel.

(6) Based on a commercial operation date of June 1987.

* * * * *

FINANCING AND ANNUAL COSTS

Financing Program

The present financing program is based on the issuance of Bonds in several series to finance the construction of the Projects and placing them in commercial operation. The Supply System's 1981 Projects' construction budgets indicate that the total financing requirements for the Projects, including an allowance of $16,162,000 for the Energy and Uranium Bearing Lands Acquisition Programs, are estimated to be $7,231,000,000. These financing requirements are based on assumed commercial operation dates of June 1986 for Nuclear Project No. 4 and June 1987 for Nuclear Project No. 5. However, as discussed above, the Supply System has identified schedule extensions of eight and three months for Nuclear Projects Nos. 4 and 5, respectively, and additional financing requirements of approximately $593,000,000 The Supply System estimates that the proceeds from the 1981A and B Bonds together with monies currently available and investment income thereon will be sufficient to pay the costs of construction until July 1981 prior to which time additional Bonds are planned to be issued.

The estimated financing requirements for the Projects as developed by the Supply System for the 1981 Projects' construction budgets are shown in the following tabulation:

Estimated Financing Requirements
($000)

	Outstanding Bonds	1981A and B Bonds	Additional Bonds	Total
Projects:				
Construction Costs	$1,381,593	$ 92,050	$2,821,463	$4,295,106
Nuclear Fuel	98,207	114	377,247	475,568
Capitalized Interest	551,932(1)	89,205(2)	2,026,837(3)	2,667,974(4)
Bond Discount and Financing Costs	54,845	9,375	43,384	107,604(5)
Working Capital(6)	0	0	6,000	6,000
Bond Fund Reserve Account (7)	82,412	12,000	163,065	257,477
Reserve and Contingency Fund(8)	10,000	0	0	10,000
Gross Requirements	$2,178,989	$202,744	$5,437,996	$7,819,729
Investment Income(9)	(139,097)	(2,744)	(463,050)	(604,891)
Energy and Uranium Bearing Lands Acquisition Programs	10,108	0	6,054	16,162(10)
Net Financing Requirements	$2,050,000	$200,000	$4,981,000	$7,231,000(11)
Estimated Additional Costs				593,000(12)
Revised Net Financing Requirements				$7,824,000

(1) Includes interest on the outstanding Bonds capitalized to December 1, 1982.

(2) Includes interest on the outstanding Bonds from December 1, 1982 to March 1, 1983 and estimated interest on the 1981A and B Bonds to March 1, 1983.

(3) Includes all capitalized interest on the 1981A and B Bonds and the outstanding Bonds after March 1, 1983.

(4) Based on actual interest rates for the outstanding Bonds issued through the 1980A Bonds and assumed interest rates on additional Bonds ranging from 9.25% to 7.75%. Does not include an allowance for capitalized interest on the funding of certain owner's contingencies.

(5) Includes actual costs for the outstanding Bonds through the 1980A Bonds and estimated costs on additional Bonds. Does not include an allowance for bond discount and financing costs identified with the funding of certain owner's contingencies.

(6) As required by the resolution authorizing the Bonds.

(7) Based on the maximum six-months' interest accruing on the principal amount of each issue. Does not include an allowance for Bond Fund Reserve Account identified with the funding of certain owner's contingencies.

(8) A maximum of $10,000,000 is required by the resolution authorizing the Bonds.

(9) Includes actual income to March 1, 1980 and estimated future income on the proceeds of the Bonds.

(10) The resolution authorizing the Bonds provides that a maximum of $95,000,000 may be authorized for these programs.

(11) Based on the Supply System's 1981 Projects' construction budgets.

(12) Identified cost increases discussed under the caption "The Supply System."

* * * * * * * * * *

Assumptions

In the preparation of this report and in the opinions which follow, it has been necessary to make certain assumptions with respect to conditions which may occur in the future. While we believe these assumptions are reasonable for the purpose of this report we make no representation that they will in fact occur. To the extent that actual future conditions differ from the assumptions contained herein, the results obtained from use of the assumptions will vary from actual results. Certain major assumptions used in this report include:

1. The Projects will be completed within the cost estimate in the Supply System's 1981 Projects' construction budgets of $7,231,000,000 plus an estimated increase of $593,000,000 identified since the 1981 Projects' construction budgets were prepared.

2. Nuclear Project No. 4 will begin commercial operation in February 1987 and Nuclear Project No. 5 will begin commercial operation in Septemer 1987.

3. Under Scenarios A and B Bonneville will acquire sufficient resources to meet its requirements under the Regional Power Act.

4. Annual costs of the Projects are based on actual interest rates on outstanding Bonds issued through the 1980A Bonds and assumed interest rates on additional Bonds ranging from 9.25% to 7.75% and actual investment income to March 1, 1980 and estimated future income at interest rates ranging from 9.0% to 7.5% on the proceeds of the Bonds.

5. The Bonds will be issued to yield approximately level debt service based on 30 year amortization beginning July 1, 1988.

6. The Project will operate at an assumed 68% annual plant factor after the first two years of operation of each unit.

7. Annual operating costs of the Projects including Insurance, Operation and Maintennace, Administrative and General, and Renewals and Replacements are estimated by the Supply System in 1981 dollars and will escalate at approximately 8% per year. Nuclear Fuel costs are estimated by the Supply System based on enrichment plant tails assay of 0.20% and no recycle of uranium and plutonium.

8. Short term investments will earn 7.5% annual interest rate. Long term investments will earn 8.0% annual interest rate.

9. Bonneville will increase its current wholesale power rates to the Participants by 53% on July 1, 1981 and future rates will reflect the projections made in August 1980 by Bonneville in its analysis of possible future wholesale power rates under the Regional Power Act.

10. The load forecast and projected customer data contained herein are as provided by each Participant. Projected expenses and capital additions for each Participant's system are based on historical and current financial data of the individual utility. Projected debt service for each utiility includes principal and interest payments on existing debt plus estimated debt service on future borrowings to pay the costs of a specified portion of planned capital additions. Debt was assumed to be issued at 8% interest for all Participants except for borrowers from the Rural Electrification Administration where a combination of 5% and 9% interest was used.

11. Projected operating revenues are calculated to be sufficient to meet all projected costs including provisions for capital additions from revenues and payments to the Sup-

ply System for the capability of the Projects in accordance with the Participants' Agreements if it is not disposed of in some other manner.

12. A general inflation factor of 8% per year was assumed for all appropriate costs and expenses of the Participants' systems.

13. All Participants and Bonneville will execute new net requirements power sales contracts under which Bonneville will be required to meet each Participant's firm power loads in excess of such Participant's committed own resources and Bonneville will provide services related to transmission, forced outage reserves, scheduling, load factoring and peak capacity as needed.

14. Power costs from, and output of, the Participants' own generating resources are based on data received from the Participants.

15. Bonneville will enter into contracts to deliver the output of the Projects to the Participants' systems if it is not disposed of in some other manner. Wheeling charges for delivery of the output of the Projects and of the Participants' own generating resources over Bonneville transmission lines are based on the Bonneville Transmission Rate Filing with the Federal Power Commission, July 1, 1976. These rates are currently in effect but are subject to revocation. Bonneville has recently announced proposed new transmission rates which have not been included in our analyses. Transmission losses are based on information supplied by Bonneville.

Conclusions

Based upon our studies, investigations and analyses and the assumptions set forth in this letter with respect to the Supply System's proposal to acquire and construct the Projects, we are of the opinion that:

1. Exclusive of the Projects, the resources currently estimated to be available to Bonneville and the Participants are not adequate to enable Bonneville to serve the estimated firm power and energy requirements which it is expected Bonneville will be required to meet under the provivions of the Regional Power Act.

2. The estimated cost of power from the Projects is comparable to other long-term power supply resources that may be available to serve increasing regional load requirements, including a portion of the Participants' increasing requirements.

3. The Assignment Agreements and the Short Term Sales Agreement provide a method of marketing a portion of the capability of the Projects that may be surplus to the individual needs of Participants during the early years of operation of the Projects.

4. The provisions of the Participants' Agreements, the Assignment Agreements and the Short Term Sales Agreement provide a sound basis on which to proceed with the Supply System's program for the Projects.

5. The estimated revenue requirements of each of the Participants analyzed herein are within reason. Assuming the load growth estimates of the Participants are realized, the revenues of the Participants should be adequate to pay their operating and maintenance expenses, including payments to the Supply System under the Participants' Agreements.

We have furnished to you the information under the captions "Power Supply in the Pacific Northwest" and "The Participants", and in "Estimated Annual Cost of Power" and "Extraordinary Reserve Fund" under the caption "Nuclear Projects Nos. 4 and 5" in the Official Statement and Exhibit A thereto. In our opinion, the information contained therein which was furnished by us is correct.

Respectfully submitted,

R.W. Beck and Associates

* * * * *

EXHIBIT B

UNITED ENGINEERS & CONSTRUCTORS INC.
30 South 17th Street, Philadelphia, Pa. 19101

March 17, 1981

Board of Directors
WASHINGTON PUBLIC POWER SUPPLY SYSTEM
3000 George Washington Way
Richland, Washington 99352

Subject: WASHINGTON PUBLIC POWER SUPPLY SYSTEM NUCLEAR PROJECT NO. 4

Gentlemen:

United Engineers & Constructors Inc. ("UE&C") was selected and retained by Washington Public Power Supply System ("Supply System") as Construction Engineer to provide engineering and construction management services for Washington Public Power Supply System Nuclear Project No. 4 (the "Project") being constructed on the Hanford Reservation of the United States Department of Energy, near Richland, Washington. UE&C was also selected and retained to perform similar functions for Washington Public Power Supply System Nuclear Project No. 1 ("WNP-1") of similar design and located adjacent to the Project.

Prior to June 1978 UE&C performed, as an independent contractor, those functions necessary for the design and construction of WNP 4 and as Containment Constructor under the provisions of the ASME Pressure Vessel Code, Section III, Division 2. In June 1978, UE&C's responsibilities at the Project site, other than as design engineer and as containment constructor, were modified as a result of the consolidation of UE&C's and the Supply System's staffs into a merged site organization headed by the Supply System's Project

Manager. UE&C's construction management personnel were integrated with the Supply System's to form the merged site organization. The merged site organization has performed at the direction of and under the control of the Supply System the functions of project management, construction management, contract administration, planning scheduling, cost estimating, quality assurance, cost accounting, and cost control.

In September 1980, the Supply System announced its intention to dissolve the merged site organization and to hire Bechtel Power Corporation ("Bechtel") to perform construction management functions. During the transition from the merged site organization to Bechtel's assumption of construction management duties, UE&C will continue to provide site construction management manpower and will perform as Engineer and UE&C will continue to provide site construction management manpower and will perform as Engineer and Construction Manager for both WNP 1 and 4. The transition from UE&C to Bechtel is expected to occur around June 1, 1981. UE&C had earlier expected that Bechtel would become Construction Engineer on or about January 1, 1981. UE&C expects that the functions of project management, construction management, contract administration, planning, scheduling, cost estimating, quality assurance, cost accounting, and cost control will be turned over to Bechtel on or before June 1, 1981. After the transition UE&C expects to perform, as an independent engineer, the functions necessary for the design of the Project and the duties of Containment Constructor under the provisions of ASME Pressure Vessel Code, Section III, Division 2. After June 1, 1981, UE&C will continue to be directly responsible for performance of the duties of Construction Engineer set out in Resoution No. 890 of the Board of Director of the Supply System which relate to the design of the Project and the duties of Containment Con-

structor under the provisions of ASME Pressure Vessel Code, Section III, Division 2, which will be performed by UE&C. The other duties of the Construction Engineer will then be performed by Bechtel.

The agreement between UE&C and the Supply System provides for the compensation of UE&C on a cost plus fixed fee basis as determined by the contract. UE&C will receive its compensation solely from the proceeds of bonds or other evidences of indebtedness issued by the Supply System for the Project

The Project

The Project is located on the Hanford Reservation, approximately 3 miles west of the Columbia River and 12 miles north of the City of Richland. It is planned to consist of a pressurized-water reactor electric generating plant having a nominal capacity of 1,250,000 kilowatts together with related transformation and switching facilities. Current plans call for five basic structures comprising the power plant. These are the reactor containment building, general services building, turbine-generator building, cooling towers and circulating water pumpt house, and river makeup water plant. The river makeup water plant will be shared between the Project and WNP-1.

The Project will use a nuclear steam supply system containing a Babcock & Wilcox pressurized water reactor which will deliver superheated steam to the turbine generator. The turbine generator system, to be furnished by Westinghouse Electric Corporation, incorporates two stages of steam reheating and seven stages of feedwater heating. The turbine generator, an 1,800 rpm unit with a rating of 1,413,000 kVA at 0.95 power factor, has an output voltage of 25 kV.

Cooling for the turbine condenser will be provided by means of mechanical draft cooling towers, which will mini-

mize the addition of heat to the Columbia River. A small amount of river water will be used to replace the evaporation lost from the cooling towers.

To provide auxiliary power for emergencies, redundant diesel generators are included in the plant design. Each diesel generator is sized such that power for all essential plant loads can be supplied, whenever required, without the need for any offsite power sources.

The Project output will be stepped up to 500 kV for connection to the Federal Columbia River Power System by means of three single-phase main step-up transformers. One spare single-phase transformer of the same rating is also provided. The cost of transmission lines for the Project is not included in the Project cost estimate.

Current Estimated Project Costs and Construction Contracts

The construction cost estimate for the Project was developed jointly by UE&C and the Supply System on an equitable cost basis which takes into consideration that both WNP-1 and the Project benefit from the economies of dual unit construction and, therefore, share certain costs on the basis of the proportion of respective benefit. The estimated cost of construction of the Project as of May 1979, was $1,247,030,000, as set forth in Attachment A. The May 1979 estimate included $34,129,000 for certain costs estimated and controlled by the Supply System. The estimate of May 1980 as set forth in Attachment A was $1,697,784,000 and included $41,148,000 for certain costs estimated and controlled by the Supply System. The May 1980 estimate reflects an increase of $450,754,000 over the estimate of May 1979. The increase results from: (a) the twelve month extension to June 1986 for the commercial operation date as discussed below; (b) revisions to reflect actual experience for the factors used

to establish the base estimate (such as productivity levels, manhour requirements, escalation rates and material quantities); (c) changes to plant structures, systems and equipment necessitated by development of the design in certain areas (including compliance with the designs of vendor furnished equipment and consideration of regulatory changes); and (d) resultant additional architect-engineer and construction management services.

Subsequent to the preparation of the May 1980 estimate set forth in Attachment A, the Supply System has estimated that the commercial operation date of the Project will be further delayed by approximately 8 months on account of labor problems. The Supply System also estimates that the recent labor problems will cause increases in the financing requirements for the Project of approximately $372,000,000. This increase includes the effect of the schedule delay, the higher than anticipated labor costs established by new labor agreements and the cost of reload nuclear fuel to be paid for during the schedule extension period.

Bechtel, the Supply System and UE&C have begun to make a detailed analysis of the construction budget. This analysis, which will take several months to complete, will be used in the preparation of the 1982 project construction budgets, and may identify additional adjustments to schedules and costs.

The estimate excludes (a) land; (b) nuclear fuel; (c) interest during construction; (d) Supply System administrative costs; (e) operational spare parts procured independently by the Supply System; and (f) the effects of various factors, such as: regulatory and statutory changes; rising costs of labor and materials ("escalation") beyond an 8% rate per year (compounded); abnormal weather; labor productivity and contractor performance problems (beyond a limited extent); labor disputes; equipment, material and skilled labor shortages;

financing; changes in Project scope or design as may be required by the Supply System, regulatory authorities or technological developments, delays in the award of material, equipment or service contracts; and unforeseeable and extraordinary conditions not included in the usual engineer's estimate of probable construction cost. Factors such as those cited above may also result in necessary adjustments to the scheduled project completion date. In the event of a further schedule extension, various Project costs will increase because of the effect on the aggregate cost for escalation, contingency, sales tax, construction facilities and engineering and construction management.

The total costs of equipment and construction contracts awarded to February 1, 1981 for the Project are shown on Attachment B. As noted on this attachment, these contracts totalled $726,766,519. For many of the contracts, escalation provisions are included and prices are subject to change on the basis of changes in cost indices published by the Bureau of Labor Statistics or certain other trade indices. The equipment and construction contracts provide materials, equipment and construction services for both the Project and WNP-1. Each such contract provides for the allocation of the costs so incurred between the Project and WNP-1.

The Supply System awarded these contracts by means of a competitive bidding process which solicited bids for the Project and WNP-1, pursuant to the statutory duties of the Supply System as a joint operating agency of the State of Washington. Factors considered by the Supply System include price and the responsiveness of the bid to bidding requirements. The Supply System is also authorized to consider each bidder's experience, qualifications, available personnel and facilities. In our opinion, the vendors and contractors which have been awarded contracts by the Supply System are qualified for the particular type of work to be performed by them.

Project Status and Schedule

Construction of the Project started in August 1975 under a limited work authorization granted by the NRC and a site certification agreement entered into with the State of Washington. A construction permit was issued by the NRC on February 21, 1978.

As of February 1, 1981, the engineering for the Project was approximately 92% complete, procurement of services and equipment for the Project was approximately 99% comlete and construction fo the Project was approximately 16% complete. The Project is in the major civil and structural phase of work. Two thirds of the steel shell of the reactor containment building has been erected, the structural steel for the general services building and the turbine-generator building is near completion; the structural steel for the circulating water pumphouse is complete; the turbine pedestal of the turbine-generator building has been constructed and the cooling towers are substantially completed. Superstructure concrete on the containment and general services buildings is being installed.

In the past the Project schedule was designed to follow the WNP-1 schedule by 18 months to reduce manpower peaking and critical craft availability problems. Based upon an analysis of a lack of anticipated progress by contractors, a reevaluation of contractor productivity, remaining construction work and the anticipated impact of regulatory and design changes, the Supply System instructed UE&C to prepare the May 1980 estimate for WNP-1 based upon an extension of the commercial operation date from December 1983 to June 1985. The Supply System also directed a reduction of the schedule separation between the Project and WNP-1 to 12 months. Accordingly, the May 1980 estimate was prepared assuming an extension in the scheduled commercial operation date for the Project of twelve months from June 1985 to June 1986.

Labor agreements with some craft unions in the Hanford area expired, and, as a result, critical path work on the Project stopped in early June 1980. New agreements have been reached and construction on the Project has resumed. As a result of the work stoppage, the Supply System estimates that commercial operation of the Project will be delayed by approximately eight months.

The Babcock & Wilcox Nuclear Steam Supply System for the Project is of a different, more current design as compared to the Three Mile Island Plant ("TMI-2") which was involved in a nuclear incident. However, UE&C and the Supply System are proceeding with those design changes which are anticipated to be required by the NRC as a result of the lessons learned from the TMI-2 incident. To the extent that these costs are able to be determined, they are included in the May 1980 estimate.

Conclusions

On the basis of, and subject to, the previous discussion in this letter, which should be read in conjunction with and as part of the following conclusions, it is our considered opinion with respect to the Project that:

1. The present plans and design are suitable for the site, and the site is suitable for the Project.

2. The program for construction is consistent with those for other installation of similar size and complexity. The achievement of commercial operation by February 1987 for the Project is realistic assuming that Bechtel provides comparable services to those contemplated to be performed by UE&C as construction manager until complete transition occurs around June 1, 1981; assuming that no delays occur as the result of Bechtel's taking over construction management duties;

and assuming, further, that Bechtel will implement appropriate construction management measures to adhere to the stated schedule.

3. Assuming a February 1987 completion date, and making the asumptions contained in paragraph 2 immediately above, the May 1980 cost estimate for the Project as modified to include the costs estimated by the Supply System for an eight month schedule delay is realistic. If delays are experienced, whether as a result of the replacement of the merged site organization as construction manager or otherwise, the cost will increase. Bechtel, the Supply System and UE&C have begun to make a detailed analysis of the construction budget, which analysis will be used in the preparation of the 1982 budget. The analysis may reveal the need for additional adjustments to cost and schedule estimates.

4. The pressurized water reactor to be furnished by the Babcock & Wilcox Company is a reasonable extension of the design of other reactors furnished by that company and presently in commercial operation.

5. The remainder of the plant is generally similar in design to conventional thermal plants except for the special considerations that are related to using steam from a pressurized water reactor, and the components are very similar to those which are now in commercial operation.

6. The Project is feasible from an engineering and construction standpoint and can be expected to operate reliably with normal maintenance.

The Project description and statements and summaries of our estimates contained in this letter and set forth under "Location', "Description" and "Status and Schedule" under the heading "Nuclear Project No. 4"

under the caption "Nuclear Projects Nos. 4 and 5" appearing in the Official Statement to which this letter is attached, are correct.

Very truly yours,

THOMAS M. DAHL
Chairman

ATTACHMENT A

WASHINGTON PUBLIC POWER SUPPLY SYSTEM
NUCLEAR PROJECT NO. 4

Construction Cost Estimate

	Estimate of May 1979 (1)	Estimate of May 1980 (2)
Structures and Improvements	$ 212,016,000	$ 327,178,000
Reactor Plant Equipment	222,970,000	246,756,000
Turbogenerator Unit	154,779,000	172,295,000
Accessory Electric Equipment	99,225,000	135,175,000
Miscellaneous Power Plant Equipment	53,713,000	58,179,000
Station Equipment	6,002,000	5,576,000
Other Tangible Property	57,830,000	73,412,000
Escalation	224,211,000	308,071,000
Contingency	52,783,000	125,643,000
Total Direct Construction Cost	$1,083,529,000	$1,452,285,000
Operational Spare Parts	100,000	74,000
Sales Tax	55,309,000	72,627,000
Architect-Engineer	75,633,000	112,864,000
Construction Manager	32,459,000	59,934,000
Owner's Cost	Not Included	Not Included
Owner's Contingencies	Not Included	Not Included
Total Construction Cost(3)	$1,247,030,000	$1,697,784,000

Capitalized Interest During Construction	Not Included	Not Included
Total Project Construction Cost	$1,247,030,000	$1,697,784,000
Nuclear Fuel	Not Included	Not Included
Capitalized Interest on Nuclear Fuel	Not Included	Not Included
Total Nuclear Fuel	Not Included	Not Included
Financing Cost	Not Included	Not Included
Total Estimate(4)	$1,247,030,000	$1,697,784,000(5)

Notes:

(1) Based on a commercial operation date of June 1985.

(2) Based on a comercial operation date of June 1986.

(3) Includes an aggregate of $34,129,000 in the May 1979 estimate and $41,148,000 in the May 1980 estimate for certain direct construction costs and sales tax estimated and controlled solely by the Supply System.

(4) See "Current Estimated Project Costs and Construction Contracts" in the letter to which this estimate is attached.

(5) Excludes the Supply System's estimate of the cost of the eight month schedule delay of $372,000,000.

* * * * *

EXHIBIT C

EBASCO SERVICES INCORPORATED **EBASCO**

Two World Trade Center New York NY 10048

March 17, 1981

Board of Directors
Washington Public Power Supply System
3000 George Washington Way
Post Office Box 968
Richland, Washington 99352

Gentlemen:

Re: WASHINGTON PUBLIC POWER SUPPLY SYSTEM
NUCLEAR PROJECT NO. 5
PROJECT STATUS REVIEW AND ANALYSIS

In early 1974, Ebasco Services, Incorporated ("Ebasco") was selected and retained by the Washington Public Power Supply System ("Supply System") as Construction Engineer to provide engineering, construction management and related services for Washington Public Power Supply System Nuclear Project No. 5 (the "Project"). The Project is a duplicate of Washington Public Power Supply System Nuclear Project No. 3 and will be constructed adjacent to Nuclear Project No. 3 on a site near Satsop in southeastern Grays Harbor County, Washington.

As Construction Engineer for the Project and Nuclear Project No. 3, Ebasco is responsible for the engineering, design quality assurance, cost estimating and reporting and construction management of the Project. In addition, Ebasco is providing related services including expediting, materials application engineering, vendor quality assurance, applied physics and nuclear engineering, licensing, plant operations

and betterment, and assistance in procurement and contract administration for contracts placed by the Supply System.

In August 1978, the Supply System merged its site organization with Ebasco's with the objective to more effectively utilize the personnel available and facilitate decision making and approvals. In October 1980, the decision was made by the Supply System for Ebasco to reassume its role as an independent site organization as described above. This organization change is in process and is expected to be fully implemented in early 1981.

The Project

The Project consists of a 1,300 MWe class pressurized light-water reactor, nuclear power station, together with all necessary plant facilities including transmission facilities to interconnect with the proposed 500 kV switchyard to be constructed by the Bonneville Power Administration ("BPA"). The project shares common facilities being designed and installed for the Supply System.

The Project is located adjacent to Nuclear Project No. 3 on a site near Satsop in the southeastern portion of Grays Harbor County, approximately 16 miles east of Aberdeen and 1 mile southeast of the confluence of the Chehalis and Satsop Rivers. The site is conveniently located with respect to the main railroad line shared by the Chicago, Milwaukee, St. Paul and Pacific Railroad and the Union Pacific Railroad; U.S. Highway 12; the Chehalis River which is navigable to ocean going barges to a point approximately 5 miles west of the site; and an existing BPA transmission corridor which is part of the Federal Columbia River Power System.

The nuclear steam supply system ("NSSS"), including the fabrication of the initial nuclear fuel core, for the Project will be supplied by Combustion Engineering, Inc. and will include the System 80 pressurized water reactor design together

with two U-tube steam generators. The NSSS has a thermal rating of 3,817 MWt, and will supply approximately 18,000,000 pounds per hour of steam at 1,000 psig and 550 degrees F.

The turbine-generator will be supplied by Westinghouse Electric Corporation, and will consist of a 6-flow tandem compound steam turbine with a gross electrical output of 1,316 MWe at three and one-half inches Hg backpressure and a net electrical output of approximately 1,240 MWe. Steam exhausting from the three low-pressure sections of the turbine will be condensed by circulating water whose heat will be dissipated in a natural draft cooling tower. A groundwater intake system will provide the make-up water to replenish the evaporative losses in the cooling tower. The generator consists of a three-phase, 60 Hertz, 1,800 rpm unit rated at 1,460.5 MVA at 0.95 power factor and generates at 25 kV.

The main plant structures include the reactor containment and shield structure, the reactor auxiliary building, the fuel handling building and the control room area – all supported on a common foundation mat and referred to collectively as the Combination Structure – and the turbine-generator building. The Combination Structure will be founded on fresh sandstone rock and is designed to withstand a horizontal seismic ground acceleration of 0.32g. A natural draft hyperbolic cooling tower, 500 feet high with a base diameter of 400 feet, is the largest plant structure. In addition, there is planned an administration and service building.

As a result of the nuclear incident at the Three Mile Island Plant ("TMI-2"), the design of the NSSS for the Project is being carefully evaluated by Ebasco, Combustion Engineering and the Supply System. Although the design and the supplier of the Project NSSS are not the same as TMI-2, modifications may be required. The effect of such modifications on the design, licensing, schedule, cost and operation of the Project cannot be fully determined at this time.

The Project is being designed to comply with applicable existing codes, laws, standards and regulations of local, state and federal agencies; includes components and equipment of proven design or reasonable extensions of proven design concepts; and is compatible with the comprehensive land-use plans and zoning requirements of the site region.

Current Estimated Project Costs and Construction Contracts

The construction cost estimate for the Project was developed on an equitable cost basis which takes into consideration that both Nuclear Project No. 3 and the Project benefit from the economies of dual unit construction and therefore share certain costs on the basis of the proportion of respective benefit. The estimated capital cost of the items within Ebasco's scope of responsibility as of July 1980 was $1,962,132,000 as shown in Attachment A. The estimate is an estimate of the Ebasco responsible items included in the Fiscal Year 1981 Project Construction Budget. The estimate includes the Project schedule extension per Supply System instructions as discussed below. The schedule assessment of the impact of the WNP-3 Chicago Bridge and Iron ("CB&I") guyed derrick accident and the boilermaker strike is discussed below. The assessment of the cost impacts of the accident and the strike have not yet been completed.

A detailed analysis of the construction budgets is underway. It will include a cost assessment of the CB&I derrick accident, the boilermaker strike and the realigning of major construction contracts. This analysis will be incorporated into the Fiscal year 1982 Project Construction Budget. During the analysis, factors may be identified which may require schedule and cost adjustments in addition to those stated above.

The basis for escalation and contingency, which are identified separately in the estimate, are as follows:

Escalation

Labor and material escalation is computed in accordance with the terms of current labor agreements and existing material contracts. For labor and material not presently covered by labor agreements or material contracts, escalation is computed at 9% per year compounded from March 1, 1980.

A total of $329,490,000 is included to cover future escalation on awarded contracts when payable per commercial terms (i.e. other than firm prices) and future escalation from January 1980 for unawarded contracts. A change of 1% in the annual escalation rates would result in an increase or decrease of approximately $35,000,000 in the estimate.

Contingency

A total of $108,950,000 in March 1980 dollars is included as contingency to cover the impact of design uncertainties, quantity refinements, and departures from assumed productivity rates.

As of February 1, 1981, 182 prepurchased equipment and construction contracts totalling $936,459,000 or approximately 61% of the expected total value of all equipment and construction contracts for the Project have been placed. A listing of the contracts authorized is shown in Attachment B. The remaining equipment contracts are expected to be awarded during the next twelve months.

These contracts were awarded by the Supply System by means of a competitive process pursuant to the statutory requirements with which the Supply System must conform as a joint operating agency of the State of Washington. Factors considered by the Supply System include price and responsiveness of the bid to bidding requirements. The Supply System is also authorized to consider the bidder's experience,

qualifications, available personnel and facilities. In our opinion, the vendors and the contractors who have been awarded contracts by the Supply System are qualified for the particular type of work to be performed by them.

Project Status and Schedule

As of February 1, 1981, engineering activities were 79% complete, prepurchased equipment and material procurement activities were 87% complete and construction of the Project was approximately 11% complete. The engineering percent complete is currently being calculated in accordance with an earned value system of measurement. This measurement system was developed to give a more accurate status in the late stages of engineering design.

Preliminary site work commenced in April 1977 and major Project site excavation activities are complete. Installation of the reactor auxiliary building foundation mat concrete commenced in March 1979 and was completed during June 1979. The reactor building concrete shield wall was completed in July 1979. Work is proceeding on the turbine building concrete and structural steel, the reactor auxiliary building substructure concrete and on the reactor building steel containment vessel. The latter work effort was delayed on a day for day basis from October 6 to November 17, 1980, by a strike involving the boilermakers.

Based on an analysis of current and forecasted future contractor productivities and the potential impact of regulatory and design changes resulting from the TMI-2 accident, the Supply System instructed Ebasco to prepare the Fiscal Year 1981 Budget Capital Cost Estimate for WNP-3 based upon an extension of the commercial operation date from December 1984 to June 1986. In addition, the Supply System instructed that the estimates be based upon a reduction of the schedule separation between the Project and WNP-3 to twelve from eighteen months. Accordingly, The Fiscal Year

1981 Budget Capital Cost Estimate for the Project was prepared assuming an extension in the scheduled commercial operation date of twelve months from June 1986 to June 1987.

On May 29, 1980, the WNP-3 Chicago Bridge and Iron guyed derrick collapsed under a no load situation. As a result, the Project guyed derrick was out of service until August 5, 1980. A schedule assessment for both WNP-3 and the Project has been completed. The current schedule impact is estimated at six weeks.

The current Level I schedule indicates an impact of approximately three months due to the above mentioned CB&I derrick accident and the boilermaker strike. Recovery plans have been developed to minimize or eliminate the above impact.

Conclusions

We have reviewed in depth those aspects of the Project which are within Ebasco's scope of responsibility. Based upon presently known regulatory criteria and the schedular and economic assumptions set forth herein. it is our considered opinion, with respect to the Project, that:

1. The Satsop site is a suitable location for the Project.

2. All aspects of the Project are of presently proven engineering design or application, or are reasonable extensions thereof. Modifications to the design as required by TMI-2 will be implemented as they become known.

3. The Project is being designed to comply with existing licensing requirements at local, state and federal levels.

4. The program for construction is consistent with those for other installations of similar size and complexi-

ty, and is realistic. The completion of the Project in accordance with the schedule is reasonably anticipated.

5. The work within Ebasco's scope of responsibility is expected to be completed within the Fiscal year 1981 Budget Capital Cost Estimate subject to adjustment to reflect the impacts of the CB&I derrick accident; the boilermaker strike and construction contracts realignment discussed under the caption "Current Estimated Project Costs and Construction Contracts".

6. Following an initial period of testing and preliminary operation, the Project is expected to operate in a reliable manner with normal maintenance.

The Project description and statements and summaries of our estimates contained in this letter which are set forth under the heading "Nuclear Project No. 5" under the caption "Nuclear Projects Nos. 4 and 5" appearing in the Official Statement to which this letter is attached are correct.

Very truly yours,

W. WALLACE III
President

ATTACHMENT A
WASHINGTON PUBLIC POWER SUPPLY SYSTEM
NUCLEAR PROJECT NO. 5
Construction Cost Estimate

	Estimate as of July 1980(1)
Land and Land Rights	$ 7,363,000
Structures and Improvements	407,703,000
Reactor Plant Equipment	314,912,000
Turbogenerator Unit	210,093,000
Accesory Electric Equipment	77,565,000
Miscellaneous Power Plant Equipment	61,496,000
Station Equipment	23,375,000
Other Tangible Property	114,500,000
Escalation	329,490,000
Contingency	108,950,000
Total Direct Construction Cost	$1,655,447,000
Operational Spare Parts	5,561,000
Sales Tax	86,027,000
Architet-Engineer	113,424,000
Construction Manager	101,673,000
Owner's Cost	Not Included
Owner's Contingencies	Not Included
Total Project Estimate	$1,962,132,000(2)
Capitalized Interest During Construction	Not Included
Total Project Construction Cost	$1,962,132,000
Nuclear Fuel	Not Included
Capitalized Interest on Nuclear Fuel	Not Included
Financing Cost	Not Included
Other Authorized Cost	Not Included
Total Project Estimate	$1,962,132,000

(1) Based on a commercial operation date of June 1987. This is the estimate upon which the Fiscal Year 1981 Project Construction Budget is based.

(2) Includes an aggregate of $55,176,000 for certain direct construction, operational spare parts and sales tax costs estimated by the Supply System.

* * * * *

EXHIBIT D

FORMS OF OPINIONS OF COUNSEL

[LETTERHEAD OF WOOD & DAWSON]
[LETTERHEAD OF HOUGHTON CLUCK COUGHLIN & REILY]

Board of Directors
Washington Public Power Supply System
Richland, Washington

Dear Sirs:

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, GENERATING FACILITIES REVENUE BONDS, SERIES 1981 (NUCLEAR PROJECTS NOS. 4 AND 5), $,000,000

At your request we have examined into the validity of an issue of $,000,000 Generating Facilities Revenue Bonds, Series 1981 (Nuclear Project Nos. 4 and 5), of Washington Public Power Supply System (the "System"), a municipal corporation and joint operating agency of the State of Washington. Said bonds are issuable in coupon form, registrable as to principal only, in the denomination of $5,000 each, and in fully registered form, without coupons, in denominations of $5,000 and any multiples thereof. The coupon bonds are numbered from 1 upwards and are dated March 1, 1981. The fully registered bonds are numbered from R-1 upwards and, except fully registered bonds initially issued, which are dated March 1, 1981, shall be dated so that no gain or loss of interest shall result from exchanges or transfers thereof as provided therein and in the Bond Resolution hereinafter mentioned.

[MATURITY INFORMATION TO BE INSERTED]

Said bonds are subject to redemption prior to maturity at the option of the System upon the terms and conditions set forth therein, and recite that they are issued under and pursuant to Resolution No. 890, adopted by the Board of Directors of the System on February 23, 1977, as amended, and a resolution supplemental thereto, Resolution No. , adopted by said Board on March , 1981 (collectively, the "Bond Resolution"), and under the authority of and in full compliance with the Constitution and statutes of the State of Washington, including Titles 43 and 54 of the Revised Code of Washington, for the purpose of paying the cost to the System of the construction and acquisition of all or an undivided ownership interest in certain nuclear electric generating facilities, constituting and to be known as the Washington Public Power Supply System Nuclear Projects Nos. 4 and 5, as a separate utility system of the System and for certain other corporate purposes of the System.

We have examined the Constitution and statutes of the State of Washington, certified copies of proceedings of the Board of Directors of the System authorizing the issuance of said bonds, including the Bond Resolution, other proofs relating to the issuance of said bonds and an executed coupon bond of said series.

In our opinion, the System is a municipal corporation and joint operating agency of the State of Washington, duly created and validity existing, the Bond Resolution has been duly adopted and the provisions thereof are valid and binding upon the System, said bonds have been duly authorized and issued in accordance with the Constitution and statutes of the State of Washingotn, and said bonds constitute valid and legally binding obligations of the System payable solely from the funds and revenues as set forth and provided in the Bond Resolution on a partiy with the bonds heretofore or hereafter issued on a parity therewith pursuant to the Bond Resolution.

In a lawsuit pending in the Superior Court for Grays Harbor County, Washington ((*Washington Public Power Supply System v. Date et al.*, No. 70423), the defendants, among other things, question the legal existence of the System and its corporate powers with respect to the construction of nuclear reactors, including the aforesaid Nuclear Projects Nos. 4 and 5. We are of the opinion that such claim is without merit.

It is to be understood that the rights of the holders of said bonds under the same and under the Bond Resolution and the enforceability thereof may be subject to judicial discretion, the valid exercise of the sovereign police powers of the State of Washington and of the constitutional powers of the United States of America, and valid bankruptcy, insolvency, reorganization, moratorium and other laws affecting creditors' rights.

It is also our opinion that the interest on said bonds is exempt from taxation by the United States of America under existing laws and regulations.

Very truly yours,

EXHIBIT E

TABLE OF PARTICIPANTS AND PARTICIPANTS' SHARES

	Participants' Share
Districts:	
Public Utility District No. 1 of Benton County, Washington	.05080
Central Lincoln People's Utility District	.02668
Public Utility District No. 1 of Chelan County, Washington	.00642
Public Utility District No. 1 of Clellam County, Washington	.01373
Public Utility District No. 1 of Clark County, Washington	.09858
Clarksdale People's Utility District	.00781
Public Utility District No. 1 of Cowlitz County, Washington	.09132
Public Utility District No. 1 of Douglas County, Washington	.00011
Public Utility District NO. 1 of Franklin County, Washington	.02925
Public Utility District No. 2 of Grant County, Washington	.00581
Public Utility District No. 1 of Grays Harbor County, Washington	.04410
Public Utility District No. 1 of Klickitat County, Washington	.00982
Public Utility District No. 1 of Lewis County, Washington	.02021
Public Utility District No. 1 of Mason County, Washington	.00156
Public Utility District No. 3 of Mason County, Washington	.00971
Northern Wasco County People's Utility District	.00324
Public Utility District No. 1 of Okanogan County, Washington	.00681
Public Utility District No. 2 of Pacific County, Washington	.00848

Public Utility District No. 1 of Pond Oreille County, Washington	.00402
Public Utility District No. 1 of Skamanis County, Washington	.00257
Public Utility District No. 1 of Snobomish County, Washington	.13051
Tillamook People's Utility District	.00781
Vern Irrigation District No. 15	.00257
Public Utility District No. 1 of Wahkiakum County, Washington	.00123

Cities:

City of Bandon, Oregon	.00067
City of Blalos, Washington	.00067
City of Bonners Ferry, Idaho	00190
City of Burley, Idaho	00190
City of Canby, Oregon	.00525
City of Cascade Locks, Oregon	.00067
City of Centralia, Washington	.00659
City of Drain, Oregon	.00067
City of Ellensburg, Washington	.00625
City of Hayburn, Idaho	.00257
City of Idaho Falls, Idaho	.00915
Town of McCleary, Washington	.00123
City of McMinnville, Oregon	.00971
City of Milton-Freswater, Oregon	.00056
City of Port Angeles, Washington	.00469
City of Richland, Washington	.01965
City of Rupert, Idaho	.00324
City of Springfield, Oregon	.01764
Town of Stellacoom, Washington	.00145
City of Sumas, Washington	.00022
City of Tacoma, Washington	.10696

Cooperatives:

Alder Mutual Light Company	.00011
Benton Rural Electric Association	.00670
Big Bend Electric Cooperative, Inc.	.00514
Blachly-Lane Electric Cooperative Association	.00458
Central Electric Cooeprative, Inc.	.00971
Clearwater Power Company	.00324
Columbia Basin Electric Cooperative, Inc.	.00391

Columbia Rural Electric Association, Inc.	.00647
Consumers Power, Inc.	.01351
Coos-Carry Electric Cooperative, Inc.	.00581
Douglas Electric Cooperative, Inc.	.00514
Elmshurst Mutual Power & Light Company	.00581
Fall River Rural Electric Cooperative, Inc.	.00648
Glacier Electric Cooperative	.00179
Hood River Electric Cooperatie	.00301
Idaho County Light & Power Cooperative Association, Inc.	.00045
Inland Power & Light Company	.02244
Kootenai Electric Cooperative, Inc.	.00647
Lane Electric Cooperative, Inc.	.00770
Lincoln Electric Cooperative (Washington)	.00190
Lost River Electric Cooperative, Inc.	.00134
Lower Valley Power & Light, Inc.	.00837
Midstate Electric Cooperative, Inc.	.00703
Missoula Electric Cooperative, Inc.	.00581
Nespelem Valley Electric Cooperative, Inc.	.00045
Northern Lights, Inc.	.00514
Obop Mutual Light Company	.00089
Okanogan County Electric Cooperative, Inc.	.00045
Orcas Power and Light Company	.00647
Parkland Light & Water Company	.00134
Prairie Power Cooperative, Inc.	.00089
Raft River Rural Electric Cooperative, Inc.	.00391
Ravalli County Electric Cooperative, Inc.	.00234
Rural Electric Company	.00089
Salem Electric	.00458
Salmon River Electric Cooperative, Inc.	.00084
Tranner Electric	.00100
Umatilla Electric Cooperative Association	.01573
Unity Light and Power Company	.00134
Vigilante Electric Cooperative, Inc.	.00290
Wasco Electric Cooperative, Inc.	.00134
Wells Rural Electric Company	.00045
West Oregon Electric Cooperative, Inc.	.00134
Total	1.00000

ORDER AND JUDGMENT OF DISMISSAL DATED OCTOBER 7, 1985 OF THE WASHINGTON SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

FREDRIC HABERMAN, M.D., et al. Plaintiffs, and AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., et al., Plaintiffs-Intervenors, and UNITED STATES TRUST COMPANY OF NEW YORK, AS TRUSTEE, Plaintiff-Intervenor, v. WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et al., Defendants.	NO. 84-2-06452-8 ORDER AND JUDGMENT OF DISMISSAL

This matter was preassigned to the undersigned judge of this Court. At hearings on April 12, 1985 and May 9, 1985 plaintiffs were given leave to file a Third Amended Complaint and plaintiffs-intervenors were given leave to file a First Amended Complaint In Intervention. Defendants, other than Chemical Bank, filed motions to dismiss, on various grounds, the claims asserted against them by plaintiffs and plaintiffs-intervenors. Affidavits and memoranda were filed in support of defendants' motions to dis-

miss, and affidavits and memoranda were submitted in opposition thereto by plaintiffs and plaintiffs-intervenors. Oral argument on the motions to dismiss was heard on July 26, 1985. The Court announced its oral decision following the conclusion of oral argument on that date.

Plaintiffs and plaintiffs-intervenors thereafter filed motions for reconsideration of the Court's decision. In addition, the Supply System and the Supply System members and defendants Houghton, Cluck, Coughlin & Riley and Wood & Dawson filed motions for reconsideration of the Court's decision. Oral argument on the motions for reconsideration was heard on October 7, 1985, following which the Court denied the motions for reconsideration of plaintiffs and plaintiffs-intervenors, but granted the motions for reconsideration of the aforesaid defendants (except that Wood & Dawson's motion for reconsideration was denied with respect to the alleged unconstitutionality of certain aspects of RCW 21.20.430(7)).

All parties and their counsel were given an opportunity to present their arguments at the July 26, 1985 and October 7, 1985 hearings, and the Court has heard and duly considered all arguments presented at the hearings and has read and duly considered the pleadings, papers and materials filed in this action as listed in the Appendix attached hereto and incorporated herein by this reference.

Accordingly, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

1. All claims set forth in plaintiffs-intervenors' First Amended Complaint In Intervention are hereby dismissed, with prejudice;

2. The so-called "scienter" amendment to the Washington State Securities Act (Laws of 1985, ch. 171, now codified as RCW 21.20.430(7)) is valid and applies retroactively to this litigation;

3. The claims of parties joined as plaintiffs after the filing of the original complaint do not relate back to the date of filing of the original complaint;

4. Claims added after the filing of the original complaint, but asserted by plaintiffs named in the original complaint and arising out of the same series of events and transactions as alleged in the original complaint, do relate back to the date of filing of the original complaint;

5. Plaintiffs' failure to join earlier their proposed additional defendants Edward J. Wittman, Herbert C. Westfall, Robert B. Gallup, Raytheon Company and ENSERCH Corporation constituted inexcusable neglect, and in any event plaintiffs' Third Amendment Complaint does not state a cause of action against them. Accordingly, plaintiffs' motion to join the proposed additional defendants is denied;

6. As an additional ground for dismissal of plaintiffs' Third Amendment Complaint with respect to the individual defendants Donald C. Patterson and Stanley T. Pardo, the motion of said defendants to dismiss the summons and complaint of the Haberman plaintiffs on the grounds of defective service of process is granted in all respects; and

7. All defendants are to be awarded their taxable costs against plaintiffs and plaintiffs-intervenors.

DONE IN OPEN COURT this 7th day of October, 1985.

/s/ Terrence A. Carroll
Terrence A. Carroll
Judge of the Superior Court

IN THE SUPREME COURT OF WASHINGTON

FREDERIC HABERMAN, and the other named plaintiffs identified on Schedule A attached to this complaint, individually and as representative plaintiffs for the limited purpose of tolling any applicable statute of limitations until other former and present holders of Washington Public Power Supply System Bonds for Nuclear Projects 4 & 5 are given the opportunity to individually join or intervene in this action as plaintiffs pursuant to Civil Rules 17, 19, 20 and/or 24 of this court;[1]

Appellants,

and

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., et al.,

and

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee,

Intervenor-Appellants,

vs.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY,

No. 52559-5

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[1] The rules referred to are those governing cases in the Superior Courts of the State of Washington.

WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF CLALLAM COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF COWLITZ COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON; CITY OF ELLENSBURG, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF FRANKLIN COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF GRANT COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF GRAYS HARBOR COUNTY, WASHINGTON; PUBLIC UTILITY DISTICT NO. 1 OF KLICKITAT COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF LEWIS COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF MASON COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF PACIFIC COUNTY, WASHINGTON; CITY OF RICHLAND, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF SKAMANIA COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON; CITY OF TACOMA, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF WAHKIAKUM COUNTY, WASHINGTON; CITY OF SEATTLE, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF FERRY COUNTY, WASHINGTON;

PUBLIC UTILITY DISTRICT NO. 1 OF KITTITAS COUNTY, WASHINGTON; CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT, OREGON; PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY, WASHINGTON; NORTHERN WASCO COUNTY PEOPLE'S UTILITY DISTRICT OREGON; PUBLIC UTILITY DISTRICT NO. 1 OF PEND ORIELLE COUNTY, WASHINGTON; TILLAMOOK PEOPLE'S UTILITY DISTRICT, OREGON; VERA IRRIGATION DISTRICT NO. 15, WASHINGTON; CITY OF BANDON, OREGON; CITY OF BLAINE, WASHINGTON; CITY OF BONNERS FERRY, IDAHO; CITY OF BURLEY, IDAHO; CITY OF CANBY, OREGON; CITY OF CASCADE LOCKS, OREGON; CITY OF CENTRALIA, WASHINGTON; CITY OF DRAIN OREGON; CITY OF HEYBURN, IDAHO; CITY OF IDAHO FALLS, IDAHO; TOWN OF MC CLEARY, WASHINGTON; CITY OF MC MINNVILLE, OREGON; CITY OF MILTON-FREEWATER, OREGON; CITY OF PORT ANGELES, WASHINGTON; CITY OF RUPERT, IDAHO; CITY OF SPRINGFIELD, OREGON; TOWN OF STEILACOOM, WASHINGTON; CITY OF SUMAS, WASHINGTON; ADLER MUTUAL LIGHT COMPANY, WASHINGTON; BENTON RURAL ELECTRIC ASSOCIATION, WASHINGTON; BIG BEND ELECTRIC COOPERATIVE, INC., WASHINGTON; BLACHLYLANE ELECTRIC COOPERATIVE ASSOCIATION, REGON; CENTRAL ELECTRIC COOPERATIVE,

INC., OREGON; CLEARWATER POWER COMPANY, IDAHO; COLUMBIA BASIN ELECTRIC COOPERATIVE, INC., OREGON; COLUMBIA RURAL ELECTRIC ASSOCIATION, INC., OREGON; CONSUMERS POWER, INC., OREGON; COOSCURRY ELECTRIC COOPERATIVE, INC., OREGON; DOUGLAS ELECTRIC COOPERATIVE, INC., OREGON; ELMHURST MUTUAL POWER AND LIGHT COMPANY, WASHINGTON; FALL RIVER RURAL ELECTRIC COOPERATIVE, INC., IDAHO; GLACIER ELECTRIC COOPERATIVE, MONTANA; HOOD RIVER ELECTRIC COOPERATIVE, OREGON; IDAHO COUNTY LIGHT & POWER COOPERATIVE ASSOCIATION, INC., IDAHO; INLAND POWER & LIGHT COMPANY, WASHINGTON; KOOTENAI ELECTRIC COOPERATIVE, INC., IDAHO; LANE ELECTRIC COOPERATIVE, INC., OREGON; LINCOLN ELECTRIC COOPERATIVE, INC., WASHINGTON; LOST RIVER ELECTRIC COOPERATIVE, INC., IDAHO; LOWER VALLEY POWER & LIGHT, INC., WYOMING; MIDSTATE ELECTRIC COOPERATIVE, INC., OREGON; MISSOULA ELECTRIC COOPERATIVE, INC., MONTANA; NESPELEM VALLEY ELECTRIC COOPERATIVE, INC., WASHINGTON; NORTHERN LIGHTS, INC., MONTANA; OHOP MUTUAL LIGHT COMPANY, WASHINGTON; OKANOGAN

COUNTY ELECTRIC
COOPERATIVE, INC.,
WASHINGTON; ORCAS POWER &
LIGHT COMPANY,
WASHINGTON; PARKLAND
LIGHT & WATER COMPANY,
WASHINGTON; PRAIRIE POWER
COOPERATIVE, INC., IDAHO;
RAFT RIVER RURAL ELECTRIC
COOPERATIVE, INC., IDAHO;
RAVALLI COUNTY ELECTRIC
COOPERATIVE, INC., MONTANA;
RURAL ELECTRIC COMPANY,
IDAHO; SALEM ELECTRIC,
OREGON; SALMON RIVER ELEC-
TRIC COOPERATIVE, INC.,
IDAHO; TANNER ELECTRIC,
WASHINGTON: UMATILLA
ELECTRIC COOPERATIVE
ASSOCIATION, OREGON; UNITY
LIGHT AND POWER COMPANY,
WASHINGTON; VIGILANTE
ELECTRIC COOPERATIVE, INC.,
MONTANA; WASCO ELECTRIC
COOPERATIVE, INC.,
WASHINGTON; WELLS RURAL
ELECTRIC COMPANY, NEVADA;
WEST OREGON ELECTRIC
COOPERATIVE, INC., OREGON;
ERNST & WHINNEY, CPA'S;
BLYTH, EASTMAN, PAINE, WEB-
BER, INC.; DONALD C. PATTER-
SON, III; STANLEY T. PARDO;
PAINE, WEBBER, INC., ; PAINE,
WEBBER, JACKSON & CURTIS,
INC.; R.W. BECK & ASSOCIATES;
UNITED ENGINEERS AND CON-
STRUCTORS, INC.; EBASCO SER-
VICES, INC.; WOOD & DAWSON;
HOUGHTON, CLUCK, COUGHLIN
& RILEY, JOHN DOE AND
RICHARD ROE, INC.,

Appellees.

and

CHEMICAL BANK,

Appellee in its capacity
as Bond Trustee.

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Appellants Fredric Haberman, *et al.* (which include all those persons and firms listed in Schedule A hereto) are appealing to the United States Supreme Court from that portion of the decision and order issued in this action on October 8, 1987, as corrected by the order dated February 17, 1988, which held that RCW 21.20.430(7) (Laws of 1986, ch. 304, § 1) does not violate the United States Consitution's "impairment of contract clause," *U.S. Const.* Art. 1, § 10, c.1. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ Scott R. Tucker

Of Counsel

Myer Feldman
Edward J. Tolchin
GINSBURG, FELDMAN
AND BRESS, Chartered
1250 Connecticut Ave., NW.
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& MATTHEWS
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Christopher Kane
Scott R. Tucker
FERGUSON & BURDELL
29th Floor
One Union Suare
Seattle, WA 98101
(206) 622-1722

Robert H. Jaffe
Howard G. Schlesinger
JAFFE & SCHLESINGER, P.A.
8 Mountain Avenue
Springfield, NJ 07081
(201) 467-2246

Counsel for Appellants

Fredric Haberman, *et al.*

Dated: May 11, 1988

SCHEDULE A

The Haberman Appellants include:

Individuals and Estates:

Fredric Haberman, M.D., a New Jersey Resident; Claude Purvis, a Washington Resident; Nerou Cheng, a New York Resident; Ted R. Pape, a Washington Resident; Aubrey L. Moss, a New Jersey Resident; John H. Biggs, a New Jersey Resident; Nicholas C. Dascoli, a New Jersey Resident, Arnold Goldberg, a New Jersey Resident; Frederick J. Bormley, a New Jersey Resident; Irving J. Gross, a New Jersey Resident; Rose Gross, a New Jersey Resident; Edward Kawash, a New Jersey Resident; Frank T. Kiel, a New Jersey Resident; Martin I. Schwartz, a New Jersey Resident; Kenneth C. Washburne, a Texas Resident; Jack B. Weinberger, a Texas Resident; Alice W. Wise, a New Jersey Resident, Lloyd W. Wise, a New Jersey Resident; Norma Sandison, a Washington Resident; Daniel Gelfond, a New York Resident; Jeanne Christopher, a Washington Resident, John S. Christopher, a Washington Resident; Grace Freeman Rosen, a California Resident; Leo Freeman, a California Resident; George M. Hrunka, a New Jersey Resident; Charles M. Judge, a New Jersey Resident; Peter Madan, a New Jersey Resident; Peggy Ann Madan, a New Jersey Resident; Roert W. Madan, a New Jersey Resident; William A. Keyser, a New Jersey Resident; Marguerite E. Keyser, a New Jersey Resident; Marguerite E. Kayser, POA for Francis J. Herron, a New Jersey Resident; Merton S Freeman, a California Resident; James Korsten, M.D., a New Jersey Resident; Albert Baker, a California Resident; Barbara Jentis, a New Jersey Resident; Leigh E. Dunn, a California Resident; Rachel S. Dunn, a California Resident; Howard L. Ray, a Washington Resident; Daniel A. Berkoff, a California Resident; Albert B. Berkoff, a California Resident; George C. Banzberg, a California Resident; Ga-

briel A. Calenda, a New Jersey Resident; Charles Zeidner, a New Jersey Resident; Corinne S. Corwin, a California Resident; Lucille Zager, a California Resident: Fay Freeman, a California Resident; Ronald Klinger, a New York Resident; Robert Luban, a New Jersey Resident; Carson L. Shade, a California Resident; David Fiske, M.D., a California Resident; Albert W. Thompson, M.D., a California Resident; Jack Schaefer, a Nevada Resident; Robert L. Mast, a New Jersey Resident; Loretta Steinbach, a California Resident; Robert N. Wright, a California Resident; Jacob Malit, a Florida Resident; Doris Malit, a Florida Resident; Al Broschen, a California Resident; Marvin Neben, a California Resident; Shirley Neben, a California Resident; William C. Starrett, II, a California Resident; Arthur Brown, a Florida Resident; Arthur Brown, Trustee for 1979 Ethel Glazer Trust, a Florida Resident; Saul M. Ferman, a California Resident; Jack a Schaps, a California Resident; Leon Fein, a California Resident; Lawrence W. Pendleton, a California Resident; Imon R. Gammage, a Washington Resident; Lucy E. Gammage, a Washington Resident; Dave Rosenthal, a California Resident; Bernie Rosenthal, a California Resident; Albert M. Grathwol and John D. Grathwol, Trustees of the Mr. and Mrs. Albert M. Grathwol Trust of 1981, a California Resident Kira Fomenko, a California Resident, Abraham G. Luboff, a California Resident; Deborah R. Luboff, a California Resident; William D. Cane, a Montana Resident; Charles F. Dester, a California Resident; Albert Caponetto, a Nevada Resident; Harfold B. Hogle, a Washington Resident; G. Ralph Bartolme, Esq., a California Resident; George Tomasini, a California Resident; Albert R. Sox, a Texas Resident; Norman L. Kaufman and Lillian Kaufman, a California Resident; Herbert L. Press, a California Resident; J. Corlas Cole, a California Resident; Herbert Eckerling, a California Resisident; Morrison Ritherford, M.D., a California Resident; William Randall Dawson, a California Resident; Henry L. Pohndorf, an Idaho Resident; Dr. Wally Teuscher, a Wash-

ington Resident; Frank W. DeVol, a California Resident; Samuel Lavine Trust, a California Resident; Rose Lavine Trust, a California Resident; J. Bruce Forbes, a California Resident; Milton & Charlotte Forbes, a California Resident; Joel M. Davis, a California Resident; Ron Nelson, a California Resident; Charles M. Schulz, a California Resident; Edward P. Swain, Jr., a Washington Resident; W.I. Osborne, a Washington Resident; Johanna Budman, a California Resident; Christine A. Simon, a California Resident; Peter Van Halen, a California Resident; Glenn R. Lawrence, a California Resident; Ernest E. Elmore, a California Resident; June T. Shepherd, a Washington Resident; Vincent DeSciose, a Nebraska Resident; Peter M. Jordan, A California Resident; Neale Onstot, a Nevada Resident; Esther Kaplan, a California Resident; Phyllis B. Zasloff, a California Resident; Patsy Riccardello, a New Jersey Resident; Myron Erdmann, a California Resident; Edythe Erdmann, a California Resident; Leon S. Guthman, an Illinois Resident; Charles W. Mullenix, an Illinois Resident; Margaret R. Just, an Illinois Resident; Marshall S. Salkin, M.D., an Illinois Resident; Paul Doll, Trustee for Audrey B. Love, a Connecticut Resident; Robert M. Carlton, M.D., a California Resident; Bernadice A. Rischoff, a Pennsylvania Resident; Shirley M. Elliott, a California Resident; Robert N. Mayer, an Illinois Resident; Dr. Raymond M. Chaitin, a California Resident; Sydney Vender, a California Resident; Robert Kunst, a California Resident; Milton Greenfield, Jr., a Missouri Resident; Catherine C. Swartchild as Trustee for James Swartchild UAD 10/25/62, an Illinois Resident; Rose Kunst, a California Resident; Jack H. Irving, a California Resident; Florence Irving, a California Resident; David Bachner, a California Resident; Rita Bachner, a California Resident; George L. Kroll as Trustee for George L. Kroll Trust UAD 12/5/72, a California Resident; Michael Cudahy, an Illinois Resident; Elizabeth Stein as Trustee of Living Trust, an Illinois Resident; Jeanette S. Elliott as Trustee for Jeanette S. Elliott

Trust, an Arizona Resident; Helen F. Culver, an Illinois Resident; Philip J. James, a Nebraska Resident; Edward S. Tishman, Trustee U/A 12/18/72, f/b/o Andrew P. Tishman, a New York Resident; Edward S. Tishman, Trustee U/A 1/20/82, f/b/o Andrew P. Tishman, a New York Resident: Edward S. Tishman, Trustee U/A 2/28/79, f/b/o Leslie Tishman, a New York Resident, Lelan H. Menke, a California Resident; June R. Menke, a Caifornia Resident; Beatrice T. Kester, a California Resident; Michael Mullins, a California Resident; Maryea Mullins, a California Resident; Frank Williams, a Florida Resident; Bea Tanne Morris, a New Jersey Resident; James M. Maul, a California Resident; Beverly W. Maul, a California Resident; Max W. Strauss, a California Resident; John Farnam, an Illinois Resident; Robert G. Farnam, a California Resident; Frank W. Farnam, an Arizona Resident; Edward Jacks, an Illinois Resident; Jonathan S. Powell, a California Resident; John Verry, a California Resident; Jack Jay, a California Resident; A. Linc Lancet, a California Resident; Peoples National Bank of Washington, Executor for the Estate of John H. Sellen, Deceased, a Washington Resident; W.J. Thomas Ferguson, Executor for the Estates of Mary Violet and William H. Ferguson, Deceased, Washington Resident; William B. Moore, a Washington Resident; John R. Janet, a California Resident; Louise Shapiro, a California Resident; Robert J. Anderson, a California Resident; Barnet M. Daniels, a Florida Resident; Blanche Daniels, a Florida Resident, Merlin C. Perkins, a Utah Resident; Anthony Riccardello, a New Jersey Resident; William Hauptman, a New Jersey Resident; Dr. Alfred J. Cinelli, a New Jersey Resident; Gayle M. Schubach, trustee for Judy Radcliffe, a California Reident; Gayle M. Schubach, trusee for Henry Schubach, a Utah Resident; Gertrude Schwartz, a New Jersey Resident; W.T. Cummins, a Kentucky Resident; Joe Aggio, a California Resident, Rosalia Aggio, a California Resident; Flroence Elliott, a California Resident, Florence Savin, Trustee for Madelien Hecht, a Connecticut

Resident, Karl B. Kluge, an Arizona Resident; Geraldine V. Kluge, an Arizona Resident; Edward D. Meigs Trust, UDT dated 7/8/82, an Arizona Resident; Garth Living Trust, a California Resident; Saul Haimowitz, a California Resident; Ruth Haimowitz, a California Resident; Robert F. McNulty, a California Resident; Fred R. Jueneman or Rodney W. Jeuenman, Co-trustees UAD 9/14/77, a California Resident; Yale M. Leavy, a Florida Resident; Edwin L. Garthwaite, a California Resident; Arthur Hargrave, a California Resident; Eugene E. Koubeck, a California Resident; Richard L. Bakman, a California Resident; Lois Gregory, a California Resident; James P. Devere, a California Resident; Richard F. Hamilton, a California Resident; Jean Needham, a California Resident; William P. Allen, an Arizona Resident; Helene P. Allen, an Arizona Resident; Edward C. Forsyth, a California Resident; Ed Daniels, a California Resident; Richard Fuchslin, a California Resident; Helen Taylor, a California Resident; and E. Nicholas Sargent, M.D., a California Resident.

Corporations, Institutions and Entities Other Than Individuals and Estates:

The Morris County Savings Bank, a New Jesey Resident; Intramerica Life Insurance Company, a New York Resident; Colonial Penn Life Insurance Company, a Pennsylvania Resident; Colonial Penn Insurance Company, a Pennsylvania Resident; Philadelphia Savings Fund Society, a Pennsylvania Resident; Regent Insurance Company, a Wisconsin Resident; Reliance Insurance Company, a Pennsylvania Resident: Planet Insurance Company, a Wisconsin Resident; Commonwealth Land Title Insurance Company, a Pennsylvania Resident; Criterion Insurance Company, a District of Columbia Resident; Government Employees Insurance Company, a District of Columbia Resident; The Broad Street National Bank of Trenton, a New Jersey Resident; Harleysville Mutual Insurance Company, a Pennsylvania Resident; Pennbank/Erie, formerly

Security Peoples Trust Company, a Pennsylvania Resident; General Accident Insurance Company, a Pennsylvania Residnet; Camden Fire Insurance Association, a New Jersey Resident; Potomac Insurance Company of Illinois, an Illinois Resident; Farmers State Savings Bank, an Iowa Resident; Mercantile National Bank of Indiana, an Indiana Resident; NCNB Bancorporation, Inc., a North Carolina Resident; Philadelphia National Bank, a Pennsylvania Resident; Wemple State Bank, an Illinois Resident; Brown County State Bank, an Illinois Resident; B.M. Behrends Bank, an Alaska Resident; Coronado Bank, a Texas Resident; Cielo Vista Bank, a Texas Resident; Suburban Trust & Savings Bank, an Illinois Rseident; Farm Bureau Mutual Insurance Company of Michigan, a Michigan Resident; Central National Insurance Company of Omaha, a Nebraska Resident; American Family Lie Assurance Company of Columbus, a Georgia Resident; Rockwood Insurance Company, a Pennsylvania Resident; SouthTrust Bank of Alabama, N.A., an Alabama Resident; SouthTrust Bank of Marion County, an Alabama Resident; SouthTrust Bank of Selma, an Alabama Resident; SouthTrust Bank of Sand Mountain, an Alabama Resident; SouthTrust Bank of Dothan, an Alabama Resident; SouthTrust Bank of Baldwin County, an Alabama Resident; SouthTrust Bank of Calhoun County, an Alabama Resident; SouthTrust Bank of Etowah County, an Alabama Rseident; SouthTrust Bank of Huntsville, an Alabama Resident; SouthTrust Bank of Mobile, an Alabama Resident; Bank of Heflin, an Alabama Resident; Mutual Service Casualty Insurance Company, a Pennsylvania Resident; Pennsylvania National Mutual Casualty Insurance Company, a Pennsylvania Resident; 1st Source Bank; an Indiana Resident; Provident Alliance Life Insurance Company, a California Resident; Balboa Insurance Company, a California Resident; Modern Service Insurance Company, a Minnesota Resident; Prudential Reinsurance Company, a New Jersey Resident; Prudential Property & Casualty Insurance Com-

pany, a New Jersey Resident; Progressive Casualty Insurance Company, an Ohio Resident; North Carolina Farm Mutual Insurance Company, a North Carolina Resident; Empire Fire & Marine Insurance Company, a Nebraska Resident; American States Insurance Company, an Indiana Resident; American Economy Insurance Company, an Indiana Resident; The Lincoln National Life Insurance Company, an Indiana Resident; Insurance Company of Illinois, an Illinois Resident; Chicago Title Insurance Company, an Illinois Resident; Wausau Insurance Companies, a Wisconsin Resident, Employers Insurance of Wausau, a Wisconsin Resident; Wausau Underwriters Insurance, a Wisconsin Resident; The Hanover Insurance Co., a New Hampshire Resident; Citizens Insurance Co. of America, a Michigan Resident; SteinRoe Tax Exempt Bond Fund, an Illinois Resident; First Fidelity Bank, a New Jersey Resicent; Union Safe Deposit Bank, a California Resident; Union Bank & Trust Company, N.A., a Michigan Resident; Barett Banks Trust Company, N.A., in various fiduciary and/or agency capacities, a Florida Resident; Midlantic National Bank, a New Jesey Resident; Midlantic National Bank/North, a New Jersey Resident; United Jersey Banks, a New Jersey Resident; Audubon Indemnity Company, a Louisiana Resident; United Guaranty Corporation, a North Carolina Resident; Westmount Properties, a California Resident; Saul Haimowitz, Inc., Employees Retirement Trust Fund, a California Resident; Textile Financial Corp., a California Resident; and Worldwide Underwriters Insurance Company, a Wisconsin Resident.

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KING)

SCOTT R. TUCKER under oath states:

1. I am one of the counsel for Appellant Frederic Haberman, et al., and am competent to testify to the following facts on personal knowledge.

2. On May 11, 1988 I caused to be deposited in a United States post office or mailbox the foregoing amended Notice of Appeal addressed to the followign counsel of record:

Christopher R. Youtz
Sarianni & Youtz
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Seatle, WA 98101

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Schulte Roth & Zabel
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New York, NY 10022

Walter S. Tabler
Smith, Smart, Hancock & Tabler
3800 Columbia Seafirst Center
701 Fifth Avenue
Seattle, WA 98104

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/s/ Scott R Tucker
SCOTT R. TUCKER

SUBSCRIBED AND SWORN to before me this 11th day of May, 1988, by Scott R. Tucker.

/s/ Simon Beebe
Notary Public in and for the State
of Washington, residing at Seattle.
My commission expires 9-19-90

PERTINENT EXCERPTS OF WASHINGTON STATE SECURITIES ACT CIVIL LIABILITY PROVISIONS PERTAINING TO APPEAL OF APPELLANTS HABERMAN

21.20.010(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

21.20.430(1) Any person, who offers or sells a security in violation of any provisions of RCW 21.20.010 . . . is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition.

21.20.430(3) Every person who directly or indirectly controls a seller or buyer liable under subsection (1) . . . above, every partner, officer, director or person who occupies a similar status or performs a similar function of such seller or buyer, every employee of such a seller or buyer who materially aids in the transaction, and every broker-dealer, salesman or person exempt under the provisions of RCW 21.20.040 who materially aids in the transaction is also liable jointly and severally with and to the same extent as the seller or buyer, unless such person sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

Supreme Court, U.S.
FILED
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(3)

No. 87-1897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FREDERIC HABERMAN, *et. al.*,

vs. *Appellants,*

THE WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et. al.*,

Appellees

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

MOTION TO DISMISS

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July 18, 1988

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FREDERIC HABERMAN, *et al.*,

vs. *Appellants,*

THE WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Appellees

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

MOTION TO DISMISS

Appellee The City of Seattle ("Seattle") moves under Sup. Ct. R. 16.1(a) that this appeal be dismissed, on the ground that it is not within this Court's jurisdiction. The decision of the Supreme Court of Washington from which this appeal is taken is not a final judgment or decree and is therefore not appealable.[1]

STATEMENT OF FACTS

The ultimate issue on appeal here is the standard of proof that should apply at trial to Appellants' claims under

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[1] There are two appeals pending in this Court from the same Washington Supreme Court decision: *American Express Travel Related Services Company, Inc.* v. *The Washington Public Power Supply System*, No. 87-1889, and *Haberman* v. *Washington Public Power Supply System*, No. 87-1897. Because the issues related to appealability are identical in both appeals, Seattle has filed identical Motions to Dismiss in both appeals.

the Washington State Securities Act (the "WSSA").[2] The Washington Supreme Court has remanded those claims for trial under a scienter standard of proof, as required by Wash. Rev. Code § 21.20.430(7)(1987) (the "Scienter Amendment"). *Haberman* v. *Washington Public Power Supply System*, 109 Wn.2d 107, 124-47, 178, 744 P.2d 1032, 1048-60, 1075-76 (1987). Appellants ask this Court to hold the Scienter Amendment unconstitutional, so that they can proceed to trial under a negligence standard of proof instead.

This issue may be rendered moot by further proceedings in the Washington courts. For example, Appellants may succeed at trial on their WSSA claims by proving that Appellees acted with scienter. Conversely, Appellees may prevail below on the independent state ground that Appellees were not "sellers" of the bonds within the meaning of the WSSA.[3] Or these claims may be settled before trial.[4] Because of these possibilities, the decision below is not final and may not be appealed.

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[2] Wash. Rev. Code Ch. 21.20 (1987).

[3] In the opinion below, the Washington Supreme Court held that the federal definition of seller under § 12 of the Securities Act of 1933 should be applied in construing the scope of seller liability under the WSSA. *Haberman*, 109 Wn.2d at 130-33, 744 P.2d at 1051-52. One of the factual issues remanded to the trial court was whether Appellees qualify as sellers under that standard. *Id.* Last month, this Court narrowly limited the scope of persons who may be considered statutory sellers of securities potentially liable under § 12. *Pinter* v. *Dahl*, 56 U.S.L.W. 4579, 4584-88 (June 15, 1988).

[4] Appellants are members of the plaintiff class in parallel federal class action securities litigation. *In re Washington Public Power Supply System Securities Litigation*, MDL No. 551 (W.D. Wash.). Settlements of the class claims, including the class WSSA claims, have already been reached with many of the Appellees here, subject to court approval.

DISCUSSION

This appeal is brought under 28 U.S.C. § 1257 (1988), which allows for appeals to this Court of certain "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ."

Appellants acknowledge that the Washington Supreme Court's decision is not "final" in the traditional sense. The decision remanding Appellants' WSSA claims for trial "clearly is not one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. ____, 107 S. Ct. 1177, 1181 (1987) (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)). Appellants therefore argue that the decision "falls within one of the narrow categories of decisions that [this Court has] deemed final for purposes of review, even through the entire dispute has not yet been resolved." *Id.*

This Court has recognized four narrow exceptions to the requirement of strict finality in appeals from the state courts. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Appellants attempt to rely on two of the exceptions from the *Cox* case, but neither applies here.

I. THE SECOND *COX* EXCEPTION DOES NOT APPLY HERE

Appellants first assert that this case falls within the second exception to strict finality that was recognized in *Cox*— cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of further state court proceedings." *Cox*, 420 U.S. at 480. Appellants are wrong. Their constitutional challenge to the Scienter Amendment will be mooted if they prevail at trial below, if Appellees prevail below on an independent state ground, or if these

claims are settled before trial. Thus, this is *not* a case where "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Id.* at 478.

Because Appellants' constitutional claims may be mooted by the results of trial, the single "category 2" case that Appellants have cited is not germane. *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274 (1980),[5] involved a writ of certiorari from a New York Court of Appeals ruling allowing Mrs. Alvez to assert a maritime loss of society claim. The New York court remanded for trial. The issue before this Court was whether federal maritime law allowed Mrs. Alvez to recover loss of society damages.

The question of the finality of the state court decision was not raised until oral argument. By that time, Mrs. Alvez had prevailed at trial on remand, and defendant's counsel conceded that the defendant's appeal from the trial verdict would not challenge the award of loss of society damages. Under these narrow circumstances—where the claim had been fully tried before the issue of finality was raised here, and could not be affected by further proceedings below—this Court held that the New York Court of Appeals decision fell within the second "categorical exception to strict finality." *Id.* at 277-79.

The facts are very different here. Unlike in *American Export Lines*, it is not known here whether Appellants' constitutional claims will be mooted by further proceedings below.

The constitutional issues raised here "are too important to be decided save when absolutely necessary, and are to be

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[5] This case was cited only by the Amexco/US Appellants in No. 87-1889.

avoided if there are grounds for decision of lesser dimension." *Cox*, 420 U.S. at 509 (Rehnquist, J., dissenting). The state court process may yet render review of Appellants' constitutional claims unnecessary. As a result, the second *Cox* exception does not apply to this case.[6]

II. THE FOURTH *COX* EXCEPTION DOES NOT APPLY HERE

Appellants also attempt to rely on the fourth exception recognized in *Cox*. Again, Appellants' reliance is misplaced.

Under the fourth *Cox* exception, immediate review is allowed where *both* (1) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and (2) "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-83. This appeal meets neither requirement.

A. Reversal Will Not Terminate The Litigation of Appellants' WSSA Claims

Reversal of the state court decision would not preclude further litigation of Appellants' WSSA claims. Reversal would "merely control[] the nature and character of . . . the state proceedings still to come," *Cox*, 420 U.S. at 483,

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[6] The Haberman Appellants, in No. 87-1897, also cite *Mills* v. *Alabama*, 384 U.S. 214 (1966). *Mills* is an example of the first *Cox* exception—cases "where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. *Mills* involved a first amendment challenge to a criminal prosecution. The Alabama Supreme Court had upheld the criminal statute involved, and remanded for trial. The defendant conceded that he had no defense if the statute was constitutionally sound. Thus the outcome on remand was preordained, and appeal was appropriate. *Mills*, 384 U.S. at 217-18. *Mills* has no application here, where the outcome on remand will not be known until after trial.

by changing the standard of proof at trial from scienter to negligence.[7]

Because reversal would not determine the outcome of Appellants' WSSA claims, this case is not like the three "category 4" cases that Appellants cite.[8] For instance, in *Southland Corporation* v. *Keating*, 465 U.S. 1, 6-7 (1984), this Court allowed the appeal in part because "reversal of a state-court judgment in this setting will terminate litigation of the merits of this dispute."

Hudson Distributors, Inc. v. *Eli Lilly & Co.*, 377 U.S. 386 (1964), also involved a dispositive issue on appeal. That case was a suit by a retailer to invalidate a state fair trade act on federal antitrust grounds. The Ohio Supreme Court upheld the statute, and remanded for enforcement proceedings. This Court accepted review, noting that the issues still pending in the Ohio courts were separate from the validity of the statute. *Id.* at 389 n.4. If this Court had reversed the Ohio Supreme Court, and invalidated the statute, the remanded state court proceedings to enforce the statute would have been terminated.

Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963), involved the assertion by two defendant national banks that a special federal venue statute immunized them from suit in Travis County, Texas. The Texas Supreme Court refused to enforce the federal venue statute, and remanded for trial. This Court accepted review, stating that the venue issue was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and

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[7] The Haberman Appellants, in No. 87-1897, assert that reversal of the Washington Supreme Court "will likely result in summary disposition of this case and many of these related cases." This assertion is speculative and totally unsupported.

[8] These three cases, discussed *infra*, were cited only by the Haberman Appellants in No. 87-1897.

legal issues comprising the plaintiff's cause of action." *Id.* at 558. This Court then upheld the venue statute and reversed the Texas decision, thereby terminating the suit against the national banks in Travis County.

The case at bar does not fit the mold of these cases. The standard of proof issue that Appellants seek to bring before this Court is not dispositive of their WSSA claims. It is not an issue that is "separate and independent" from the merits of the underlying cause of action. The question of the standard of proof to be applied at trial is the very sort of interlocutory issue, "enmeshed in the factual issues comprising the plaintiff's cause of action," *id.* at 558, that should await trial before being reviewed here. This appeal does not satisfy the requirement that reversal would preclude further litigation. This appeal should be dismissed.

B. Refusing Immediate Review Will Not Erode Federal Policy

The second element of the fourth *Cox* exception likewise is not satisfied here, since no serious erosion of federal policy will result if the Washington Supreme Court decision is allowed to stand pending trial. *Cox*, 420 U.S. at 483.

The standard of proof to be applied to Appellants' state law securities fraud claims does not affect the future conduct of third parties. This is not a case where first amendment rights will be chilled if the state decision is left unreviewed. *Cf. Cox*, 420 U.S. at 485-86.

Nor is this a case where a federal statutory scheme will be undetermined if an incorrect state supreme court decision is left standing. *Cf. Southland*, 465 U.S. at 6-7 (Federal Arbitration Act); *Hudson Distributors*, 377 U.S. at 395 (Sherman Act); *Mercantile National Bank*, 371 U.S. at 558-62 (National Banking Act). The Washington Supreme Court decision merely requires Appellants to try their state

law securities claims under a scienter standard of proof—*consistent* with the federal securities scheme. *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 (1976) (scienter is an essential element of a federal securities fraud claim under § 10(b) of the Securities Exchange Act of 1934).

The resolution of Appellants' constitutional claims "can await final judgment without any adverse effect upon important federal interests. A contrary conclusion would permit the fourth [*Cox*] exception to swallow the rule." *Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981). Since no federal policy will be undermined by allowing this case to go to trial before review is had here, this appeal should be dismissed.

CONCLUSION

Strict finality of the state court decision below is ordinarily required for an appeal to this Court. No recognized exception to that requirement applies here. This appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

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No. 87-1897

(4)

IN THE

Supreme Court of the United States

October Term, 1987

FREDRIC HABERMAN, *et al.*,

Appellants,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Appellees.

On Appeal from the Supreme Court of Washington

COLUMBIA APPELLEES' MOTION TO DISMISS THE APPEAL

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July 18, 1988

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This Motion to Dismiss is submitted on behalf of the following appellees, which for convenience are referred to collectively as the "Columbia Appellees" or "these appellees":

Columbia Rural Electric Association, Inc.

Blachly-Lane County Cooperative Electric Association

Columbia Basin Electric Cooperative, Inc.

Consumers Power, Inc.

Coos-Curry Electric Cooperative, Inc.

Douglas Electric Cooperative, Inc.

Hood River Electric Cooperative

Inland Power & Light Company

Lane Electric Cooperative, Inc.

Midstate Electric Cooperative, Inc.

Salem Electric

Umatilla Electric Cooperative Association

Wasco Electric Cooperative, Inc.

Kootenai Electric Cooperative, Inc.

Fall River Rural Electric Cooperative, Inc.

Lost River Electric Cooperative, Inc.

Raft River Rural Electric Cooperative, Inc.

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IN THE

Supreme Court of the United States

October Term, 1987

FREDRIC HABERMAN, *et al.*,

Appellants,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Appellees.

On Appeal from the
Supreme Court of Washington

COLUMBIA APPELLEES' MOTION TO DISMISS THE APPEAL

INTRODUCTION

This Motion to Dismiss is brought by the seventeen rural electric cooperatives listed on the inside front cover, referred to collectively herein as the "Columbia Appellees." These appellees were defendants in the state court proceedings. Two appeals were filed in this case, one by a group of plaintiffs led by Fredric Haberman (hereinafter "the Haberman appellants" or simply "Haberman") and the other by a group of intervenors led by American Express Travel Related Services Company, Inc. (hereinafter "the American Express appellants" or simply "American Express").[1] The Columbia Appellees

[1] A cross-appeal was also filed by defendant Wood Dawson Smith & Hellman.

move to dismiss both appeals, in whole or in part, on the following grounds:

1. Pursuant to Rule 16.1(a), the Columbia Appellees move to dismiss both appeals as not within this Court's jurisdiction, because the decision appealed from is not a final judgment, and to dismiss the Commerce Clause and Equal Protection issues raised by the American Express appellants as not within this Court's jurisdiction, because American Express has no standing to raise these issues.

2. Pursuant to Rule 16.1(b), the Columbia Appellees move to dismiss all the issues raised by both Haberman and American Express for want of a substantial federal question and to dismiss the Commerce Clause and Equal Protection issues raised by American Express, because they were not expressly passed on and the state court's ruling that American Express lacks standing to raise those issues rests on an adequate non-federal basis.

3. Pursuant to Rule 16.1(d), the Columbia Appellees move to dismiss these appeals for prudential reasons, because appellants have failed to present this Court with all issues, regarding the constitutionality of the state statute, which they are pursuing and have stated their intention to continue to pursue in this and related litigation.

Only those grounds which apply to this appeal filed by Haberman are discussed in this motion. Additional grounds for dismissal are discussed in the parallel Motion to Dismiss being filed by the Columbia Appellees in Appeal No. 87-1889, brought by American Express.

STATEMENT OF THE CASE

This state securities fraud litigation is one of several pending cases arising from the sale of bonds, from 1977 to 1981, by the Washington Public Power Supply System to finance construction of two nuclear power plants. Construction of the plants was terminated prior to completion on January 22, 1982, and the Supply System was declared in default on the bonds in the summer of 1983. Prior to default, Chemical Bank, acting on behalf of all bondholders as Bond Fund Trustee, had sued in state court to enforce contracts, known as the "Participants' Agreements," between the Supply System and 88 public utilities, municipalities and rural electric cooperatives. Pursuant to the Participants' Agreements, the utilities, municipalities and cooperatives, which are referred to collectively as the "participants," agreed to purchase shares of the output of the two plants. On June 15, 1983, the Supreme Court of Washington issued a decision holding that the Participants' Agreements between the Supply System and the Washington public utilities and municipalities were *ultra vires* and void. *Chemical Bank v. Washington Public Power Supply System*, 99 Wash. 2d 772, 666 P.2d 329 (1983), *cert. denied*, 471 U.S. 1075 (1985). Subsequently, the Washington court ruled that the Participants' Agreements between the Supply System and the rural electric cooperatives and non-Washington public utilities and municipalities were also unenforceable due to commercial frustration and mutual mistake. *Chemical Bank v. Washington Public Power Supply System*, 102 Wash. 2d 874, 691 P.2d 524 (1984), *cert. denied*, 471 U.S. 1075 (1985). These rulings eliminated any contractual claims the bondholders may have had against any party herein except the Supply System itself.

During the spring and summer of 1983, numerous securities fraud actions were filed in the federal district courts against the Supply System, its members and directors, its

professional consultants and underwriters, the 88 participant utilities, and various other parties. These suits were consolidated for pretrial proceedings in the Western District of Washington as *In re Washington Public Power Supply System Securities Litigation*, MDL No. 551, and plaintiff classes were eventually certified on federal and state securities fraud claims. The appellants herein are members of the plaintiff classes in MDL No. 551. Trial of that litigation is scheduled to commence on September 7, 1988.

Although not opting out of the MDL No. 551 class action, the Haberman appellants, who have filed this appeal, commenced this action in the Superior Court of Washington on May 7, 1984, alleging primarily violations of the Washington State Securities Act (hereinafter "WSSA"). In March 1985 the American Express appellants, who have filed Appeal No. 87-1889, intervened in that action and alleged additional claims for common law fraud and negligent misrepresentation. The defendants, appellees in this Court except for cross-appellant Wood Dawson Smith & Hellman (hereinafter "Wood Dawson"), included the Supply System, its members, its professional consultants, the participants, and Chemical Bank.[2] Among other things, the appellants alleged that the appellees were liable under the WSSA for negligently failing to disclose material facts.

The Washington State Securities Act does not specify whether scienter must be proved to establish liability. Relying on a provision that the law be interpreted in coordination with related federal regulation, the Washington courts at first indicated that proof of scienter was not necessary to establish liability, in line with the prevailing federal court interpretation

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[2] The Columbia Appellees adopt the appellants' list of parties and state, for purposes of Rule 23.1, that they are rural electric cooperatives located in Washington, Oregon and Idaho and have no parent companies, subsidiaries or affiliates.

of Rule 10b-5. *See Shermer v. Baker*, 2 Wash. App. 845, 472 P.2d 589 (1970). However, in 1977, after this Court had ruled in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), that scienter was a necessary element of the federal cause of action, the Washington Court of Appeals held that scienter was also a prerequisite to liability under the WSSA. *Ludwig v. Mutual Real Estate Investors*, 18 Wash. App. 33, 567 P.2d 658 (1977). This remained the rule in Washington until the Supreme Court of Washington overruled *Ludwig* on March 20, 1980. *Kittilson v. Ford*, 93 Wash. 2d 223, 608 P.2d 264 (1980). In 1981, the Washington Legislature amended the WSSA to provide that scienter must be proved in cases involving securities issued by the state or its agencies. 1981 Wash. Laws 1138 (codified as amended at Wash. Rev. Code § 21.20.430(7)). In April 1985, the Washington legislature modified this amendment to the WSSA, through passage of what is known as the Scienter Amendment, S. 4114, to require additionally proof of scienter in claims made under the Act involving securities issued by Washington municipal or quasi-municipal corporations. 1985 Wash. Laws 642 (codified as amended at Wash. Rev. Code § 21.20.430(7)).[3]

On October 7, 1985, the Washington trial court dismissed all of appellants' claims in this action based in part on the Scienter Amendment, which it found constitutional and retroactive in application. The Supreme Court of Washington accepted appellants' direct appeal of this ruling. However, while the appeal was pending, the federal district court in MDL No. 551 ruled that the Scienter Amendment was *not* retroactive, absent an express provision making it so, and therefore was not applicable to the class plaintiffs' state law claims.[4]

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[3] Proof of scienter, however, was specifically *not* required for claims against bond counsel and bond underwriters.

[4] The appellants herein were excluded from this ruling under the doctrine of *res judicata*.

In re Washington Public Power Supply System Securities Litigation, [1986-1987 Transfer Binder] Blue Sky L.Rep. (CCH) ¶ 72,371, at 71,678 (W.D. Wash. January 24, 1986).

Following this ruling, the Washington legislature again modified the WSSA with passage of what is known as the Retroactivity Amendment, S. 3990. This amendment added an express provision making application of the Scienter Amendment retroactive. 1986 Wash. Laws 1354 (codified at Wash. Rev. Code § 21.20.430(7)). The federal district court in MDL No. 551 then ruled that this Retroactivity Amendment was unconstitutional under the principle of separation of powers. *In Re Washington Public Power Supply System Securities Litigation*, 673 F.Supp. 411, 417 (W.D. Wash. 1987).

On October 8, 1987, the Supreme Court of Washington issued the decision from which this appeal is taken. The court reversed the dismissal of appellants' claims under the WSSA and remanded the case for trial. However, the court upheld the constitutionality of the Scienter and Retroactivity Amendments. *Haberman v. Washington Public Power Supply System*, 109 Wash. 2d 107, 744 P.2d 1032 (1987), *modified*, 750 P.2d 254 (Wash. 1988).

Two appeals have been filed in this Court pursuant to 28 U.S.C. § 1257(2). In this appeal, the *Haberman* appellants assert that the Scienter and Retroactivity Amendments violate the Contracts Clause of the United States Constitution and join the separate jurisdictional statement filed by the American Express appellants. In Appeal No. 87-1889, the American Express appellants assert that the Scienter and Retroactivity Amendments violate the Commerce Clause, Due Process Clause and Fourteenth Amendment of the Constitution. Notably, neither group of appellants has asserted that the Washington court erred in finding that the amendments did not violate the principle of separation of powers, the one ground upon which the federal district court had ruled in their favor.

After the filing of appellants' jurisdictional statements with this Court, the federal district court in MDL No. 551 reversed its ruling on the constitutionality of the Scienter and Retroactivity Amendments. In a minute order entered June 13, 1988, the district court granted a defense motion to reconsider its prior ruling. In its written opinion issued on July 14, 1988, the district court acknowledged that, contrary to its prior ruling, the federal separation of powers principal does not apply as between a federal court and a state legislature. Thus, the federal district court and the Supreme Court of Washington are now in agreement in upholding the constitutionality of the Scienter and Retroactivity Amendments.

ARGUMENT

I. This Appeal Should Be Dimissed As Not Within This Court's Jurisdiction, Because The Decision Appealed From Is Not A Final Judgment.

This appeal should be dismissed as not within this Court's jurisdiction, because the decision appealed from is not a final judgment appealable pursuant to 28 U.S.C. § 1257(2). This litigation was not terminated by the decision of the Supreme Court of Washington, but was remanded for trial on the merits. Contrary to appellants' contentions, this case does not fit any of the four categories of exceptions to the finality requirement recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The first two categories do not apply, because the issues raised here will be mooted if appellants prevail on the merits of their WSSA claims by proving scienter in later state court proceedings.[5] As this Court explained in *Cox*

[5] The issues will also be mooted if judgment, following trial or by settlement, is entered in favor of the plaintiff classes in MDL No. 551, which judgment would be *res judicata* on appellants' state law claims in this action.

Broadcasting, the first two categories only apply where the federal issue will *not* be mooted:

> In the cases in the first two categories considered below, the federal issue would *not be mooted or otherwise affected by proceedings yet to be had* because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question. In the other two categories, however, the federal issue would be mooted if the petitioner or appellant seeking to bring the action here prevailed on the merits in the later state court proceedings, but there is nevertheless sufficient justification for immediate review of the federal question determined in the state courts.

420 U.S. at 478-79 (emphasis added).

The last two categories also do not apply to this case. The third category does not apply, because later review of the federal issue is not barred under state law. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 481. The fourth category does not apply, because reversal of the state court's ruling on the constitutionality of the Scienter and Retroactivity Amendments will not preclude further litigation. It would simply change the nature and character of the state proceedings by allowing appellants to recover upon proof that appellees negligently, rather than intentionally or recklessly, made representations in violation of the Act. As this Court explained in *Cox Broadcasting*, the fourth category applies only where reversal of the state court on the federal issue would preclude further litigation on the relevant cause of action:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, *and where reversal of the state court on the federal issue would be preclusive of any further*

> litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-83 (emphasis added).

Since the decision of the Supreme Court of Washington is not a final judgment and does not meet any of the exceptions to the finality requirement, this appeal is not properly brought under 28 U.S.C. § 1257(2) and should be dismissed as not within this Court's jurisdiction.

II. This Appeal Should Be Dismissed For Want Of A Substantial Federal Question

This Court should dismiss this appeal without oral argument, because the issue raised concerning the constitutionality of the Scienter and Retroactivity Amendments does not present a substantial federal question. In support of this argument the Columbia Appellees rely on the reasoning of the Supreme Court of Washington set forth in the decision appealed from.[6]

III. This Appeal Should Be Dismissed For Prudential Reasons

This appeal should be dismissed for prudential reasons, because the appellants have failed to bring before this Court

[6] The insubstantiality of appellants' argument is highlighted by the fact that at the time most of the bonds were sold, Washington law required proof of scienter as a prerequisite to recovery under the WSSA. *Ludwig v. Mutual Real Estate Investors*, 18 Wash.App. 33, 567 P.2d 658 (1977).

all grounds upon which they actively contend the Scienter and Retroactivity Amendments are unconstitutional. In a sense, the appellants are seeking only an advisory opinion of this Court on whether the state statutory amendments are constitutionally valid based upon the grounds stated in their Jurisdictional Statement. Regardless of this Court's affirmation of the constitutionality of the amendments, the appellants have indicated they will continue to argue in the related federal court litigation that the amendments are unconstitutional under the separation of powers doctrine.

Although the Supreme Court of Washington squarely addressed and rejected the separation of powers argument, appellants have failed to raise it on this appeal, not because they accept the state court's ruling as correct, but to avoid being bound by this Court's affirmance on that issue. In footnote 8 on page 11 of the Jurisdictional Statement in Appeal No. 87-1889, in which the Haberman appellants have expressly joined, appellants state that they do not believe the Washington court's ruling on the constitutionality of the Scienter and Retroactivity Amendments should act as *res judicata* to bar them from challenging the statute in the parallel federal securities litigation. At the time these appeals were docketed, the district judge in the federal litigation had ruled that the amendments were unconstitutional based on the principle of separation of powers. Appellants here seek review of only some issues addressed by the state court in order to preserve other issues, such as the separation of powers argument, for later appeal, if necessary, in the federal litigation.

Rule 16.1(d) provides that an appellee may move to dismiss an appeal for any reason. Columbia Appellees suggest that this Court should not set oral argument on this appeal due to appellants' attempts to split and manipulate the issues and their unwillingness to seek a complete and final adjudication by this Court on the constitutionality of the Scienter and Retroactivity Amendments.

CONCLUSION

This Court should dismiss this appeal for lack of jurisdiction, for failure to present a substantial federal question, and for prudential reasons due to appellants' failure to seek a complete adjudication by this Court of the constitutionality of the challenged state statute.

Respectfully submitted,

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(5)

No. 87-1897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FREDRIC HABERMAN, *et al.*,

Appellants,

vs.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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358pp

QUESTIONS PRESENTED

(1) Does 28 U.S.C. § 1257(2) confer jurisdiction upon this Court to hear an appeal from an order of a state's highest court upholding a statute of that state against a federal constitutional challenge:

(a) where the order of the state's highest court remands the case for further proceedings, and thus is not on its face a final judgment or order of that court; and

(b) where the order of the state's highest court cannot possibly fit any of the exceptions to the final order rule under the doctrine of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)?

(2) Does a ruling by the highest court of a state upholding a statute of that state against constitutional challenge under the "Contracts Clause" present a substantial federal question, where:

(a) the statute merely fixes part of the proof required for recovery under a statutory remedy of that state;

(b) the contract allegedly impaired makes no reference to the statutory remedy, and only refers to statutory state law in the broadest, most generic way; and

(c) the statute in issue does not alter the contractual obligations of any party in this litigation?

PARTIES BELOW

The list of parties to this appeal may be found in an attachment to the Jurisdictional Statement of the Appellants entitled "Schedule of All Parties to Proceedings Below" which is incorporated herein by reference.

STATEMENT PURSUANT TO RULE 28.1

The Statement Pursuant to Rule 28.1 may be found in an attachment to this brief.

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No. 87-1897

IN THE

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OCTOBER TERM, 1987

FREDRIC HABERMAN, *et al.*,

Appellants,

vs.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

Appellees[1] move this Court to dismiss the appeal herein or, in the alternative, to affirm the decision and order of the Supreme Court of Washington on the grounds that the purported federal question raised on appeal is so insubstantial as to require no further argument.

[1] Appellee-defendants joining this motion are listed at the end of this brief, along with their counsel. All Appellees joining this motion are also joining in a companion motion to dismiss another appeal from the same order and decision filed by certain Intervenor-plaintiffs, American Express Travel Related Services Company, Inc., *et al.* v. The Washington Public Power Supply System, *et al.*, No. 87-1889.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Appellants assert jurisdiction for this appeal under 28 U.S.C. § 1257(2), which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellants challenge the validity of Wash. Rev. Code § 21.20.430(7)(1987), generally known as the "Scienter Amendment", which states:

> Notwithstanding subsections (1) through (6) of this section, if an initial offer or sale of securities that are exempt from registration under RCW 21.20.310 is made by this state or its agencies, political subdivisions, municipal or quasi-municipal corporations, or other instrumentality of one or more of the foregoing and is in violation of RCW 21.20.010(2), and any such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such issuer acting on its behalf, or person in control of such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such person acting on its behalf, materially aids in the offer or sale, such person is liable to the purchaser of the security only if the purchaser establishes scienter on the part of the defendant. The word "employee" or the word "agent," as such words are used in this sub-section, do not include a bond

> counsel or an underwriter. Under no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters. The provisions of this subsection are retroactive and apply to any action commenced but not final before July 27, 1985. In addition, the provisions of this subsection apply to any action commenced on or after July 27, 1985.

Wash. Rev. Code. § 21.20.010(2)(1987) provides:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> * * *
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

Thus, the statute at issue here merely clarifies when "scienter" must be proven to recover any damages allegedly arising from a violation of Wash. Rev. Code § 21.20.010(2).

Appellants assert that the Scienter Amendment violates U.S. Const., Art. 1, Section 10, Clause 1, which provides that:

> No State shall . . . pass any Law impairing the Obligation of Contracts . . . .

STATEMENT OF THE CASE

Appellants are plaintiffs in a Washington state court proceeding. They seek to recover losses that allegedly arose due to misrepresentations made in connection with the sale of municipal bonds issued by the Washington Public Power Supply System (the "Supply System"), a municipal corporation organized under the laws of the state of Washington. The Supply System issued the bonds between 1977 and 1981 in the principal amount of $2.25 billion to finance the construction of two nuclear projects for electricity generation in the state of Washington (the "Projects"). These Appellants purchased approximately $40 million of these bonds.

The Bond Resolution, pursuant to which the bonds were issued and sold, provided that debt service obligations on the bonds would be satisfied under the terms of certain "Participants' Agreements." The Participants' Agreements were agreements between the Supply System and 88 public utility entities in the Pacific Northwest (the "Participants"). These agreements provided for the purchase of shares of the generating "capability" of the Projects. If the Projects were completed, the Supply System would pay debt service by selling the Projects' electricity to the Participants. In addition, the Participants' Agreements provided that, if the Projects were not completed, the Participants would nevertheless pay the debt service obligations according to the same share formula under which they had agreed to purchase electricity. Because the Supply System terminated construction of the Projects in January of 1982, when they were still far from complete, this second prong of the Participants' Agreements came into play.

Shortly after the termination of the Projects in January, 1982, Chemical Bank, Trustee for the Projects' bond fund, filed a declaratory judgment action in the Washington state courts seeking a declaration that the Participants' Agreements were valid and enforceable. On June 15, 1983, the Supreme Court of Washington held certain of the Participants' Agreements void *ab initio*. *Chemical Bank v. WPPSS*, 99 Wash. 2d 772, 666 P.2d

329 (1983). This decision hinged on a legal finding that it was an *ultra vires* act for the Washington municipal Participants to enter the Participants' Agreements. On November 6, 1984, the Supreme Court of Washington reaffirmed this *ultra vires* decision, and then held all the other Participants' Agreements unenforceable on the grounds of mutual mistake and commercial frustration. *Chemical Bank v. WPPSS*, 102 Wash. 2d 874, 691 P. 2d 524 (1984), *cert. denied*, 471 U.S. 1065 (1985). As a result of these decisions, no funds were available to the Supply System to make the required payments on the bonds, and a payment default ensued.

Appellants commenced their lawsuit in May of 1984. Prior to that time, several securities fraud class-actions on behalf of Supply System bond purchasers had already been commenced in the federal courts. Numerous federal class-actions have since been consolidated in a multi-district proceeding (the "MDL-551" case), and two classes of bond purchasers have been certified. MDL-551 is set to begin trial on September 7 of this year in Tucson, Arizona, with The Honorable William D. Browning of the District of Arizona presiding. All of the misrepresentation claims in Appellants' lawsuit are in the MDL-551 federal class-action. All of the Appellants are members of at least one of the plaintiff classes in MDL-551.

Appellants' complaint contains twelve (12) alleged causes of action, including a claim against Chemical Bank as bond fund Trustee, several so-called derivative claims, several inventive equity claims, and a claim under Section 12 of the Securities Act of 1933. There is no claim for breach of contract against any defendant. The only claims in the Appellants' complaint that are in issue on this purported appeal arise under the Washington State Securities Act ("WSSA") Wash. Rev. Code § 21.20.010 *et seq.* (1987). This Act permits private lawsuits for violations of certain of its provisions under limited circumstances. A brief review of the relevant provisions of WSSA, and some of the pertinent legislative history, will highlight the issue the Appellants pursue here.

WSSA is a relatively standard collection of statutory provisions governing the purchase, sale or issuance of securities in the state of Washington. Like most such state regulatory schemes, it parallels the federal securities laws to a large extent. Under Wash. Rev. Code §21.20.010, certain types of acts are specifically forbidden in the purchase or sale of securities. Another provision, Wash. Rev. Code §21.20.430, provides for private civil remedies in the event of a violation of Wash. Rev. Code §21.20.010. Appellants brought two claims under Section 21.20.430, one for primary liability under Section 21.20.430(1), and the other charging secondary liability under Section 21.20.430(3).

Prior to 1980, it was commonly understood that recovery in a private action under WSSA required proof of fraud, *i.e.* proof that a violation was committed with intent to defraud, or with scienter. *See, e.g., Ludwig v. Mutual Real Estate Investors*, 18 Wash. App. 33, 567 P.2d 658 (1977). But in *Kittilson v. Ford*, 93 Wash.2d 223, 608 P.2d 264 (1980), the Washington Supreme Court held that under some circumstances scienter need *not* be proven for a violation of Wash. Rev. Code §21.20.010(2), which provides:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> * * *
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

The basic rationale offered in *Kittilson* for not requiring proof of scienter for a violation of this provision appears to have been simply that this provision did not use the words "fraud" or "defraud."

Concerned that public servants could be held liable for simple negligence under this newly announced standard, the Washington legislature promptly enacted a "Scienter Amendment" to WSSA. This amendment insured that a scienter standard would apply to WSSA claims involving the securities of certain Washington public entities. As originally enacted in 1981, the Scienter Amendment provided:

> [I]f an initial offer or sale of securities by the state or its agencies is in violation of RCW §21.20.010(2), each member of the governing body or person in control of the state or agency, each committee member, public officer, or director acting on its behalf, and each employee thereof who materially aids in the offer or sale, are liable to the purchaser of the security only if the purchaser establishes scienter on the part of the defendant.

(Wash. Laws of 1981, ch. 272, § 9(7).) Thus, the new statute mandated that when a security was issued by the state or one of its agencies, a scienter standard would apply to any WSSA claim arising out of that issue and directed at certain persons or entities related to the issuer.

In 1985, the Washington state legislature broadened this scienter requirement. (Wash. Laws of 1985, ch. 171, § 1(7).) This 1985 amendment changed the scienter requirement as follows:

- It broadened the class of public issuers covered by the provision by adding "political subdivisions, municipal or quasi-municipal corporations, or other instrumentality of one or more of the foregoing";

- It added the municipal issuer itself and the "agents" of the issuer to the list of persons to whom the scienter standard applies;

- It restricted the provision to apply only to municipal issues "exempt from registration under

RCW 21.20.310," in keeping with the well-established statutory distinctions related to municipal securities; and

— It expressly excluded bond counsel and underwriters from the scienter standard.

This was where the law stood in October of 1985, when the state trial court dismissed the Appellants' entire complaint on the grounds that none of its twelve counts stated a cognizable cause of action. This dismissal decision of the Washington state trial court then came before the Supreme Court of Washington on direct appeal. In the Washington Supreme Court, Appellants challenged the constitutionality of the Scienter Amendment, and also disputed almost every other aspect of the trial court's dismissal decision. On October 8, 1987, the Supreme Court of Washington reversed the trial court's dismissal decision on a number of grounds, and remanded the case for further proceedings consistent with its opinion. *Haberman v. Washington Public Power Supply System*, 109 Wash.2d 107, 744 P.2d 1032 (1987), *modified and further reconsideration denied*, ____Wash.2d ____, 750 P.2d 254 (1988). In its opinion, the Washington Supreme Court reversed the trial court's dismissal of Appellants' securities claims under Wash. Rev. Code §§ 21.20.430(1) and (3), but denied Appellants' challenge to the constitutionality of the Scienter Amendment as applied to those claims.[2]

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[2] Between the trial court decision and the Washington Supreme Court decision, the Washington legislature amended the Scienter Amendment again, but only to make it clear that it was intended to apply retroactively. (Wash. Laws of 1986, ch. 304, § 7.) The version of the Scienter Amendment reviewed by the Supreme Court of Washington, and thus the version before this Court, is the current law, which contains the retroactive implementation language.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION TO HEAR THIS PURPORTED APPEAL BECAUSE THE ORDER AT ISSUE IS MANIFESTLY NOT FINAL.

Appellants seek to bring this appeal under 28 U.S.C. § 1257(2), which grants jurisdiction to this Court to hear appeals of certain "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." But there is simply no final order or judgment to be found in Appellants' case at this point. Although the decision of the Washington Supreme Court upheld the constitutionality of the Scienter Amendment, that decision clearly permits Appellants to pursue their claims impacted by that Amendment on remand. Appellants thus have a full opportunity in the trial court to litigate the causes of action they seek to have this Court review. Accordingly, this case is not ripe for review by this Court, and this appeal should be dismissed.[3]

A. The Washington Supreme Court's Order Is Not Final On Its Face.

The Washington Supreme Court remanded Appellants' WSSA claims for trial, and thus clearly did not render a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Stringfellow v. Concerned Neighbors in Action*, __ U.S. __, 107 S. Ct. 1177, 1181 (1987) (*quoting Catlin v. United States*, 324 U.S. 229, 233 (1945)). Appellants do not dispute this point, and, in fact, concede that they could well "prevail at trial on non-federal grounds." (Haberman Jurisdictional Statement, p. 3.) Thus, even Appellants

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[3] Dismissal of this appeal and the companion appeal of the Intervenors would mandate dismissal of the cross-appeal of defendant Wood Dawson Smith & Hellman, since they have asserted no basis for this Court's jurisdiction over their cross-appeal other than the existence of the primary appeals. (*See* Wood Dawson Jurisdictional Statement on Cross-Appeal, pp. 6-7.)

accept that the Washington Supreme Court's decision is not a "final judgment or decree" in the traditional sense.

In spite of this concession, or because of it, Appellants nevertheless seek to invoke this Court's appellate jurisdiction, arguing that the order of the Supreme Court of Washington, although not "final," falls under the doctrine of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). But Appellants misread *Cox*. The doctrine of that case is not some elastic contrivance that can reshape itself to match whatever exigencies a frustrated appellant confronts. Rather, *Cox* demands that any prospective appeal fit a set of specific criteria. Appellants are simply unable to fit the facts of this case within the *Cox* standards.

B. The *Cox Broadcasting* Doctrine Does Not Apply To This Order.

In *Cox Broadcasting*, this Court recognized four narrow exceptions to the requirement of strict finality. 420 U.S. at 476-87. Appellants urge this Court to find jurisdiction within the second and the fourth exceptions identified in *Cox Broadcasting*. However, the facts of this action do not fit either of those *Cox* exceptions.*

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* In *Cox*, this Court enumerated the following four situations where it would review a non-final order of a state's highest court deciding a federal issue:

1. Where further proceedings have yet to occur, but the federal issue (as decided by the state's highest court) preordains the outcome of those proceedings, making the case "final" for all practical purposes. 420 U.S. at 479 ("the first *Cox* exception").

2. Where the federal issue will necessarily survive and require review, regardless of the eventual outcome of the state proceedings. *Id.* at 480 ("the second *Cox* exception").

3. Where the federal question could never again be reviewed by this Court, no matter what the outcome of the state proceedings. *Id.* at 481 ("the third Cox exception").

4. Where: (a) reversal by this Court on the federal issue would be preclusive of any further litigation; and (b) the state court decision might seriously erode federal policy. *Id.* at 482-83 ("the fourth *Cox* exception").

1. *The Present Case Does Not Fall Within The Second* Cox Broadcasting *Exception Because The Federal Issue Will Not Necessarily Survive After Further State Proceedings.*

Appellants first assert that this case falls into the second *Cox* exception to strict finality, arguing that there is a "federal constitutional issue [that] has been finally decided by the highest court in the state of Washington [and] which 'will survive and require decision regardless of the outcome of further state court proceedings.' " (Haberman Jurisdictional Statement, p. 3, *quoting Cox*, 420 U.S. at 480.) This statement is incorrect. Appellants would have no basis to challenge the Scienter Amendment if they were to prevail at trial using the higher standard of proof required by that legislation. Because further state court proceedings could yet render review of Appellants' constitutional claim unnecessary, the second *Cox* exception to finality does not apply to this case.

It is also noteworthy that this Court defined the second *Cox* exception with reference to cases where a defendant needs protection from immediate harm.[5] This factor further distinguishes

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[5] The cases cited by this Court in *Cox Broadcasting* in support of the second category all arguably involve elements of immediate hardship. Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* § 4010. Commentators suggest that this category makes more sense with such a requirement. *Id.* For example, in *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945) and in *Carondelet Canal & Nav. Co. v. State of Louisiana*, 233 U.S. 362 (1914), both state high courts ordered property to be delivered to the opposing party immediately. The loss of control by the litigants of their property could have caused immediate harm and, consequently, this Court's review ensured expedited analysis of that hardship. In *Brady v. State of Maryland*, 373 U.S. 83 (1963), this Court allowed the review of a state court judgment forcing a criminal defendant to undergo a retrial on the question of punishment, but not on the question of guilt. This Court determined that the federal issue was separable and would not be mooted by the trial, and determined that an immediate review should occur before the defendant suffered the burden of a potentially improper trial.

the present case, where Appellants, who are plaintiffs, are not being forced to give up control of any property or endure a trial that might endanger their civil liberties. Indeed, Appellants demonstrate no special hardship indicating that expedited review would be appropriate in this case.

Having conceded that the federal issue will not necessarily survive further state court proceedings, and having failed to show any particular harm that will follow upon remand, Appellants have manifestly not met the second *Cox* exception as a basis for this Court's jurisdiction.

2. *The Present Case Does Not Fall Within The Fourth* Cox Broadcasting *Exception Because Reversal On The Federal Question Will Not Be Preclusive Of Further Litigation, And Because The Order In Issue Involves No Erosion Of Federal Policy.*

Appellants also base their jurisdictional statement on the fourth *Cox* exception. To fit under the fourth exception, Appellants have to show *both* (1) that "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," *and* (2) that "a refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 482-83. Again, Appellants' reliance on this exception is misplaced.

a. Reversal By This Court Will Not Terminate Litigation Of Appellants' WSSA Claims.

Appellants stretch their view of this case too far when they suggest that a reversal by this Court of the state court decision "will likely result in summary disposition of this case." (Haberman Jurisdictional Statement, p. 4.) This statement is unsupported and unsupportable. Even were a negligence standard to apply to their WSSA claims, Appellants would still have to prove that some defendant made an "untrue statement" of a material fact in connection with the sale of Supply System bonds,

and did so negligently. Appellants apparently believe that inaccurate forecasts, such as those arguably at issue in this case (*see* Haberman Jurisdictional Statement, p. 8), constitute *per se* "untrue statements" for purposes of a WSSA claim. But a failure to predict the future does not constitute an untruth, and no Washington court, or any other court, has ever endorsed the "fraud by hindsight" approach assumed by the Appellants. In short, Appellants have a long way to go to prove that anyone made an "untrue" statement of material fact in this case.

Hence, reversal by this Court would only change the standard of culpability required to be shown at trial from a scienter standard to a negligence standard. Therefore, reversal would "merely control the nature and character of . . . the state proceedings still to come." *Cox Broadcasting*, 420 U.S. at 483. Such a reversal would not "be preclusive of any further litigation on the relevant cause of action," as is required by the first part of the fourth *Cox* exception. *Cox Broadcasting*, 420 U.S. at 482-83; *accord Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984). Because a reversal would not preclude further action, an exception to the finality requirement is not warranted.[6]

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[6] Because reversal would not determine the outcome of Appellants' WSSA claims, this case is not like the three "fourth exception" cases that Appellants cite. For instance, in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court allowed the appeal in part because "reversal of a state-court judgment in this setting will terminate litigation of the merits of this dispute." In *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964), a retailer brought suit to invalidate a state fair trade act on federal antitrust grounds and lost. This Court accepted review, noting that the issues still pending in the Ohio courts were separate from the validity of the statute. *Id.* at 389 n.4. If this Court had reversed the Ohio Supreme Court and invalidated the statute, the remanded state court proceedings to enforce the statute would have been terminated. Finally, in *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), two defendant national banks asserted that a special federal venue statute immunized them from suit in Texas. The Texas Supreme Court refused to enforce the federal venue statute and remanded for trial. This Court accepted review, stating that the venue issue was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 558. This Court then upheld the venue statute and reversed the Texas decision, thereby terminating the suit against the national banks in the improper venue.

b. Refusing Immediate Review Will Not Erode Federal Policy.

Appellants likewise fail to satisfy the second element of the fourth *Cox* exception. In no way do they show that a serious erosion of federal policy will result if the Washington Supreme Court decision is allowed to stand pending trial. *Cox*, 420 U.S. at 483. Their attempt to satisfy this element — by claiming that an important federal policy is at stake in "allowing a state legislature without good cause to alter retroactively contract remedies" (Haberman Jurisdictional Statement, p. 3) — would be more compelling if it had something to do with this case.[7] There is simply no responsible basis for arguing that the Washington state legislature passed any law affecting contract remedies. Rather, the statute at issue amended the standard of proof for a *statutory* remedy. *See*, pp. 16-20, *infra*.

In any event, the standard of proof to be applied to Appellants' state securities law claims does not conflict with any federal policies. This is certainly not a case where First Amendment rights will be chilled if the state decision is left unreviewed. *Cf. Cox*, 420 U.S. at 485-86. Nor is this a case where a federal statutory scheme will be undermined if an incorrect state court decision is left standing. *Cf. Southland Corp.*, 465 U.S. at 6-7 (Federal Arbitration Act); *Hudson Distributors*, 377 U.S. at 395 (Sherman Act); *Mercantile National Bank*, 371 U.S. at 558-62 (National Banking Act). To the contrary, the Washington Supreme Court decision requires Appellants to try their state law securities claims under a scienter standard of proof *consistent* with the federal securities law scheme. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, *rehearing denied*, 425 U.S. 986 (1976) (scienter is an essential element of a federal securities law fraud claim under § 10(b) of the Securities Exchange Act of 1934).

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[7] As was recently called to this Court's attention (*see* letter from David G. Keyko to Joseph F. Stanoil, Jr., Clerk of the Court, dated June 23, 1988), the United States District Court in MDL-551 has upheld the Scienter Amendment notwithstanding challenges based on federal policy and constitutional grounds.

The resolution of Appellants' constitutional claims "can await final judgment without any adverse effect upon important federal interests. A contrary conclusion would permit the fourth [*Cox*] exception to swallow the rule." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981). Since no federal policy will be undermined by allowing this case to go to trial without a review by this Court of the culpability standard, this appeal should be dismissed.

II.

THE APPELLANTS' CONVOLUTED "IMPAIRMENT OF CONTRACTS" ARGUMENT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The most obvious problem with Appellants' "impairment of contracts" argument is that it is not an "impairment of contracts" argument at all. Indeed, in their complaint, Appellants do not even seek to recover for a contract breach. Rather, they seek to recover on a statutory remedy, and their objection on this appeal is to the stricter burden of proof created for that statutory remedy by the Scienter Amendment. Appellants' objection, therefore, is to a change in a statutory remedy, and not to an impairment of a contract.

Generally, a mere change in remedy does not infringe upon the right to contract or infringe upon the right to enforce a contract, and thus raises no issue under the Contracts Clause. *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 430 (1934); *Karl v. Bryant Air Conditioning Co.*, 705 F.2d 164, 166 (6th Cir. 1983) (no violation of Contracts Clause because "legislative modification of remedy does not infringe the plaintiff's right to contract or deprive him of his contract enforcement cause of action"). Where, as here, Appellants complain of a change in a remedy to a *statutory* cause of action, they are even further from a violation of the Contracts Clause.

A. No Contractual Obligation Is Impaired By The Scienter Amendment.

To support a claim that a statute violates the Contracts Clause of the Constitution, Appellants must first show that the state law has operated as a substantial impairment of a contractual obligation. *Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400, 411 (1983), *citing Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-245, *rehearing denied*, 439 U.S. 886 (1978). A law impairs contractual obligations when it "renders them invalid, or releases or extinguishes them." *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 431 (1934), *citing*

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 197, 198 (1819). The Scienter Amendment, however, does not create, release or extinguish any contractual obligations. Indeed, this piece of legislation does not affect the contractual obligations of any known person.

Appellants' entire "contracts" argument rests on a single provision in the Bond Resolution for the Supply System bonds. This provision reads as follows:

> This Resolution is adopted under the authority of and in full compliance with the Constitution and laws of the State of Washington, including Titles 43 and 54 of the Revised Code of Washington, *as amended and supplemented*. In consideration of the purchase and acceptance of the Bonds by those who shall hold the same from time to time, the provisions of the Resolution and of said laws shall constitute a contract with the holder or holders of each Bond and coupon pertaining thereto, and the obligations of the System and the Board under said laws and under the Resolution shall be enforceable by any court of competent jurisdiction, and the covenants and agreements herein set forth to be performed on behalf of the System shall be for the equal benefit, protection and security of the holders of any and all of said Bonds and coupons pertaining thereto, all of which regardless of the time or times of their issue or maturity shall be of equal rank without preference, priority or distinction of any of said Bonds or coupons pertaining thereto over any others thereof except as expressly provided in the Resolution. (Emphasis added.)

On its face, this provision merely implements the Resolution itself, informing prospective bondholders that the Supply System has authority to adopt the Resolution, and that it undertakes to honor its terms, and obey the laws of the State of Washington "as amended and supplemented."

Given the language at issue, it is hard to fathom the Appellants' construction of this provision. They appear to argue

that this provision stopped legal time in its tracks, or that it caused the sovereignty of the State of Washington to be surrendered surreptitiously to the Supply System bondholders. Whatever the argument, Appellants clearly contend that this passage of the Bond Resolution prohibited the Washington legislature from changing the state's framework for securities regulation, or for that matter, presumably from changing any other statutory provision affecting the Supply System. (Haberman Jurisdictional Statement, pp. 16-17.)

Efforts by litigants to use the Contracts Clause in this fashion have long been rejected. The Contracts Clause does not destroy the power of the states to regulate matters of public interest. As this Court has observed, the Contracts Clause cannot have the reach that Appellants seek for it because:

> [o]therwise, one would be able to obtain immunity from state regulation by making private contractual arrangements. This principle is summarized in Mr. Justice Holmes' well-known dictum: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977). Even if the Appellants' reading of the Bond Resolution did not fly in the face of traditional understandings of the Contracts Clause, the fact of the matter is that the Bond Resolution envisions and adopts state law "as amended and supplemented." In short, the Bond Resolution contemplates amendments to state law, and even if it did not, the Contracts Clause does not permit private parties to leash the legislature of a state, as Appellants contend.

Finally, Appellants need a contract claim to have a Contracts Clause argument. To put it bluntly, either the Supply System breached a contractual promise under the above provision or it did not. If it did, the Appellants can sue for breach of contract,

without regard to the standard of recovery under WSSA. Whether they can also sue for a WSSA claim, and what they must prove to prevail on that claim, is a different issue. The Scienter Amendment deals with this second issue, not the breach of contract question. Without a claim that a contractual obligation has been impaired, the Appellants have no constitutional issue under the Contracts Clause.[8]

Appellants allude to several recent cases decided by this Court that have found constitutional impairments of contracts, but these cases are not even remotely on point. In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), for example, the Minnesota legislature had passed a law requiring certain corporations to fund a pension for the benefit of any employee having over 10 years of service whenever a factory in Minnesota was closed. The Allied Structural Steel Company had a pension plan that required, among other things, at least 15 years of service for vesting of pension benefits. Nine company employees, each with over 10 years of service, were released without pension benefits when the company closed a plant. During this Court's examination of the contractual obligations, the Court determined that the Minnesota statute altered the contractual relationship. The obligations imposed by the law directly added to those required in the pension plan contract. 438 U.S. at 240. This Court observed that the law abrogated express terms of the contract, thereby changing the corporation's contractual obligations for funding pensions. *Id.* at 247. Moreover, the statute affected an

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[8] Appellants undoubtedly have not sued for breach of contract because the Bond Resolution expressly limits any monetary recovery for a breach of contract to the funds in the Projects' bond fund. Pursuant to the Bond Resolution, the Supply System has already turned over the entire bond fund (an amount exceeding $100 million) to the bond fund Trustee, Chemical Bank. The Supply System thus has no funds to pay on a breach of contract claim. Moreover, a claim on the contract can only be directed at the Supply System, not the host of other defendants Appellants have sued. In short, there is a remedy limitation for breach of contract in the Bond Resolution itself, and the Appellants know well that victory on a breach of contract claim would be fruitless. Of course, the Scienter Amendment has nothing to do with any limits on the breach of contract remedy.

area not previously subject to governmental regulation. For those reasons, the Minnesota statute violated the Contracts Clause. The Scienter Amendment at issue here, however, does not change or affect any term of the Bond Resolution in any way, and consequently, *Allied Structural Steel* is totally inapposite.

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), another case cited by Appellants, also is inapposite. In *United States Trust Co.*, New Jersey and New York repealed a statutory covenant between themselves and "with the holders of any affected bonds" that *specifically stated* that the New York-New Jersey Port Authority could not use certain funds pledged as security for the affected bonds in any manner other than those enumerated in the covenant. There never was any question that the repealed statute specifically contemplated a covenant among the two states and the bondholders. In holding the statutes repealing the covenant unconstitutional, this Court determined that the covenant created a contractual obligation for the two states, that "the purpose of the covenant was to invoke the constitutional protection of the Contract Clause as security against repeal," and that "[i]ts outright repeal totally eliminated an important security provision and thus impaired the obligation of the States' contract." *United States Trust Co.*, 431 U.S. at 18-19. The Scienter Amendment to the Washington State Securities Act has no such effect upon the obligations of the parties to the Bond Resolution. No party to the contract is required by the Scienter Amendment to do any more or less than promised; nor do any of the obligations imposed by the Bond Resolution vanish because of the Scienter Amendment.

B. The Scienter Amendment Is A Legitimate Exercise Of The State Of Washington's Police Power.

This Court has long held that, even if a statute impairs some contractual obligation, that statute is not automatically unconstitutional:

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does

> not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.

Manigault v. Springs, 199 U.S. 473, 480 (1905). Of course, this power does not go unchecked, and, if "the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate purpose behind the regulation." *Energy Reserves Group*, 459 U.S. at 411, *citing United States Trust Co.*, 431 U.S. at 22.

While there is no impairment in this case, let alone a substantial impairment, the significant and legitimate public policy test could certainly be passed here. The specific public policy justifications for the Scienter Amendment are treated more fully in the companion brief on the motion to dismiss or affirm directed at the appeal of the Intervenors in this case. Here, we note only one specific respect in which the Scienter Amendment clearly passes the traditional tests of constitutional scrutiny. This Court, in *Allied Structural Steel*, listed the attributes of statutes that have survived a challenge based on the Contracts Clause, even when a contractual obligation had been impaired. 438 U.S. at 250. This list included statutes that regulate an area already subject to state regulation at the time the contractual obligations were originally undertaken. *Id.*, *citing Veix v. Sixth Ward Bldg. & Loan Assn.*, 310 U.S. 32, 38 (1940). In the present case, the Scienter Amendment affected only Washington's securities laws, an area already subject to extensive state regulation when the Supply System Bond Resolution took effect. Because Washington continued to regulate this area, the Scienter Amendment fits squarely within an approved category of statutes that

this Court has consistently sustained against Contracts Clause challenges.

Moreover, unlike New York and New Jersey in *United States Trust Co.*, the state of Washington made no promise restricting its ability to change WSSA. Absent such a promise, no surrender of the state's right to regulate as it sees fit can be presumed. This Court has held that plaintiffs' reasonable expectations under contracts drawn subject to extensive regulation are not impaired by subsequent state actions within the regulated area. *Energy Reserves Group*, 459 U.S. at 417. As this Court put this principle:

> To enact laws providing remedies for a violation of contracts [to say nothing of laws providing remedies for violation of statutes], to alter or enlarge those remedies from time to time as to the legislature may seem appropriate, is an exercise of sovereignty, and it cannot be supposed that the State in a case like this, contracts in a public act of its legislature, to limit its power in the future, even if it could do so, with or without consideration, unless the language of the act is so absolutely plain and unambiguous as to leave no room for doubt that its true meaning amounts to a contract by it to part with its power to increase the effectiveness of existing remedies as against those who purchase lands while the act remains alive. No such language is to be found in the act in question, and none ought to be implied.

Waggoner v. Flack, 188 U.S. 595, 603 (1903). In this case, the act in question does not limit Washington's power to amend and supplement its laws. Thus, no contractual promise can be inferred that could possibly limit Washington's ability to change the statutory remedy.

CONCLUSION

For the reasons stated above, this Court should dismiss this appeal or, in the alternative, affirm the decision of the Washington Supreme Court.

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STATEMENT PURSUANT TO RULE 28.1

The parent of appellee PaineWebber Incorporated is Paine Webber Group, Inc. Appellees Blyth Eastman Paine Webber Incorporated and Paine Webber Jackson & Curtis, Inc. have been subsumed in the corporate entity, PaineWebber Incorporated, and no longer exist and operate as separate corporate entities. There are no PaineWebber Incorporated subsidiaries or affiliates except wholly-owned subsidiaries.

The parent of appellee Ebasco Services Incorporated is Enserch Corp. Ebasco Services Incorporated has the following subsidiaries: E&L Associates Inc.; E&L Technologies Inc.; Ebasco Constructors Inc.; Ebasco Corporation; Ebasco Energy Resources, Inc.; Ebasco Engineering and Construction Corporation; Ebasco Industries Inc. (Delaware); Ebasco International Corporation; Ebasco Overseas Corporation; Ebasco Plant Services Inc.; Ebasco Risk Management Consultants, Inc.; Ebasco Services International Inc.; and Gates Engineering Consultants.

Appellee R.W. Beck and Associates is a partnership with no corporate parents, affiliates or subsidiaries, except wholly-owned subsidiaries.

The remaining appellees joining in this motion are either municipalities or municipal corporations. They have no corporate parents, affiliates or subsidiaries.

Supreme Court, U.S.
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No. 87-1897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FREDRIC HABERMAN, *et al.*,
Appellants,

vs.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,
Appellees.

On Appeal From the Supreme Court of Washington

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS AND/OR AFFIRM

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STATEMENT PURSUANT TO RULE 28.1

The statement required pursuant to Rule 28.1 is found in an attachment to the jurisdictional statement of appellants Fredric Haberman, *et al.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1897

FREDRIC HABERMAN, *et al.*,
Appellants,

vs.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,
Appellees.

On Appeal From the Supreme Court of Washington

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS AND/OR AFFIRM

I. Restatement of the Case

Appellees have visited upon this Court three separate briefs in which they move for dismissal of plaintiffs' appeal.[1] All three briefs advance the lack of finality doctrine as a bar to constitutional review. In addition, WPPSS, 22 of its members, and most of the professional defendants, seek an order affirming the decision of the court below. They argue that elimination by retroactive state legislative fiat of plaintiffs' property right to statutory causes of action for viola-

[1]Separate briefs have been filed on behalf of WPPSS and other defendants including the City of Ellenburg ("Ellenburg Br."), the City of Seattle ("Seattle Br."), and the Columbia Appellees ("Columbia Br.") representing 17 of the 68 non-member participants. The term "WPPSS," as well as other shorthand designations used in this brief, are defined in plaintiffs' jurisdictional statement.

tion of the Washington Blue Sky Law during the pendency of this suit does not violate the Contracts Clause, U.S. Const. Art. I, § 10, cl. 1.

Appellees' briefs contain numerous misstatements. Perhaps most egregious is the contention that, prior to 1980, a violation of RCW 21.20.430(1) required proof of scienter. This contention has been forcefully rebutted by Appellants Amexco/U.S. *See* Amexco/U.S. Brief in Opposition at 4-5. The truth is that prior to the retroactive enactment of the Scienter Amendment, investors victimized by Washington State municipalities and their agents because of prospectus fraud[2] had a property right in a strict liability cause of action for innocent misrepresentation or breach of warranty under RCW 21.20.430(1) similar to that available for a violation of Section 12 of the 1933 Act, 15 U.S.C. § 77l. *See Haberman v. WPPSS*, 107 Wash.2d 107, 749 P.2d 1032, 1048-1050 (1987).

Appellees also indulge in speculative innuendo on motives. They contend that, as members of the WSSA class in related federal litigation known as MDL-551, plaintiffs and Amexco/U.S. prosecute this appeal in an attempt to "split and manipulate the issues." Columbia Br. at 10. To be sure, appellants did not raise a federal constitutional challenge to the Washington State Supreme Court's ruling on the separation of powers doctrine. This is becauase application of this doctrine to the Scienter Amendment is a question of state constitutional law, not because of any hidden agenda. *See* Amexco/U.S. Brief in Opposition at 3, n. 4.

The recent July 14, 1988 ruling of the federal court reversing previous decisions in favor of the WSSA class on the separation of

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[2]The court below found that official statements and annual reports issued by WPPSS were subject to WSSA prohibitions against prospectus fraud. *Haberman*, 749 P.2d at 1052. More recently, the same court held in *Hoffer v. State of Washington*, 110 Wash.2d 415, 755 P.2d 781 (1988) that opinion letters of the Washington State Auditor included in WPPSS annual reports and on WPPSS 4/5 bond certificates themselves contained representations actionable under the Washington Blue Sky Law. Proof under a scienter standard of the WSSA claims raised in *Hoffer*, of course, patently will prolong that litigation. *Hoffer*, 755 P.2d at 783, 789-790.

powers doctrine and holding the Scienter Amendment constitutional cited by appellees, Columbia Br. at 6-7, adds to rather than detracts from the urgency of this appeal. Immediate review of the constitutional questions presented by plaintiffs and Amexco/U.S. patently will benefit all WPPSS 4/5 bond litigations — those in federal as well as state court — *either* by deciding WPPSS 4/5 bond purchasers have a property right to a strict liability cause of action under WSSA making possible summary disposition of this case, Plaintiffs' Jurisdictional Statement at 4, 8, *or* that the Scienter Amendment requires proof of deliberate fraudulent conduct by WPPSS to establish a WSSA violation. No matter how decided, judicial economy and the interests of WPPSS 4/5 bond purchasers in limiting litigation costs will be served by this appeal.[3]

II. Application of the Cox Broadcasting Criteria Calls for Immediate Review Under the Finality of Judgment Doctrine

Appellees correctly assert that plaintiffs rely in their jurisdictional statement on two prongs of the four-part test enunciated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) for determining whether immediate review of a final judgment on an important federal issue is appropriate under 28 U.S.C. § 1257(2).

As an initial matter, plaintiffs argue this case fits within the second criterion because the question whether retroactive application

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[3]A June 15, 1988 article entitled "Donovan, Cravath Get Share of $95 Million WPPSS Fees", *New York Law Journal*, Vol. 199, No. 114 at 1, dramatically illustrates the legal expense generated by the complexity of the fraud action in MDL-551 under SEC Rule 10b-5, 17 C.F.R. 240.10b-5. Legal fees and expenses paid by Chemical Bank, the bond trustee for WPPSS 4/5 bonds, totaled $76 million through the end of 1987. The same article goes on to state that "WPPSS records show the bank expects to pay $24 million more to [four law firms] by the year's end." The $76 million excludes fees and expenses to be sought by the class action plaintiffs in MDL-551 out of negotiated settlements, leading the article's writer to comment: "Some lawyers involved in the WPPSS case joked that costs may exceed any settlement or jury award brought [sic] by bondholders...."

of the Scienter Amendment is constitutional "will survive and require decision regardless of the outcome of further state-court proceedings." *Cox Broadcasting*, 420 U.S. at 480. Appellees' ingenuous response is that plaintiffs "would have no basis to challenge the Scienter Amendment if they were to prevail at trial using the higher standard of proof required by that legislation." Ellenberg Br. at 11. This response utterly fails to take into account appeals subsequent to trial.

Even assuming plaintiffs prevail in proving WPPSS and its agents violated RCW 21.20.430(1) utilizing scienter rather than strict liability standards, appellees certainly will appeal. Plaintiffs then will be forced to raise on cross-appeal the same constitutional issues now before this Court to preserve them for further appellate review. *See Pennsylvania v. Richie*, 94 L.Ed.2d 40, 52, n. 7 (1987) (the goals of finality are frustrated, rather than furthered, by "wasteful and time consuming procedures" requiring an appellant to fruitlessly raise constitutional issues in a new set of appeals.) If the requirement of finality is to be given a "practical rather than a technical construction," *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), this appeal surely falls within the second category of the *Cox Broadcasting* criteria.

Plaintiffs also assert the fourth *Cox Broadcasting* criterion allowing for immediate review where, as here, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and "refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 482-483. In their response, appellees misread what this Court meant by the term "relevant cause of action," Ellenburg Br. 12-13, and denigrate the importance of federal constitutional policy prohibiting impairment of contracts by state legislatures. Ellenburg Br. at 13-15.

First, the relevant cause of action presented by this appeal is not, as contended by appellees, the standard of culpability to obtain rescission of a securities transaction under WSSA. Ellenburg Br. at 13. The phrase "relevant cause of action" in *Cox Broadcasting* refers to the federal issue which the state court has finally determined, not

the case itself. 420 U.S. at 483. Here, the federal issue is whether retroactive passage of the Scienter Amendment eliminates plaintiffs' property right to strict liability causes of action for innocent misrepresentation and breach of warranty under RCW 21.20.430(1).

Causes of action constitute a species of property protected by the Constitution. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).[4] When the requirement to prove fraud is added to a state blue sky law, a quasi-contract or warranty cause of action is transmogrified into a tort claim. *Mary Pickford Co. v. Bayly Bros.*, 12 Cal.2d 501, 56 P.2d 102, 110-111 (1939). Before enactment of the Scienter Amendment, a "seller" of securities was strictly liable under the Washington Blue Sky Law for a violation of RCW 21.20.430(1). This was so even if he innocently misrepresented a material fact in a prospectus or negligently engaged in a course of conduct in connection with offers and sales of securities that operated as a fraud on investors. *See* Plaintiffs' Jurisdictional Statement at 14-15; Amexco/U.S. Brief in Opposition at 4-5. A determination by this Court that the Contracts Clause prohibits retroactive elimination of plaintiffs' strict liability action under WSSA is clearly preclusive of further litigation on the relevant cause of action raised by this appeal.

Second, it is equally clear that when state legislators enact laws that impair contracts, especially contracts of political subdivisions of the state which primarily impact on non-resident investors,[5] an important federal policy is seriously undermined. The prohibition against states enacting laws to impair contracts is found in Article I of the Constitution together with prohibitions against enactment of bills of attainder, *ex post facto* laws, and the grant of titles of nobili-

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[4]The WSSA strict liability cause of action eliminated by retroactive application of the Scienter Amendment is akin to that provided by Section 12(1) of the 1933 Act. *Cf. Pinter v. Dahl*, 100 L.Ed 2d 658, 676 (1988). ("The registration requirements are the heart of the [1933] Act, and Section 12(1) imposes strict liability for violation of these requirements.")

[5]That the bond indenture is a contract with plaintiffs cannot be gainsaid: "WPPSS contracted with the bondholders, received their money and appropriated it for its purposes." *Chemical Bank v. WPPSS*, 102 Wash.2d 875, 691 P.2d 524, 545 (1984), *cert. denied*, 471 U.S. 1065 (1985).

ty. The force of the Contracts Clause remains with us. "It is not a dead letter." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978). "[T]he Framers placed a [high value] on the protection of private contracts. Contracts enable individuals to order their personal and business affairs. . . Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Id.* 488 U.S. at 245.

The decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), cited in all three appellees' briefs as authority for dismissing this appeal, in fact strongly supports plaintiffs' case for immediate review. The question posed in *Southland* was whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, preempted legal remedies available under a state franchise investment law. The appellant who sought review under 28 U.S.C. § 1257(2) could have prevailed at trial in the state courts. However, this Court held that failure to grant immediate review left in effect a decision of the California State Supreme Court holding that a state franchise investment law can be read to bar arbitration under federal law, a potentially serious erosion of federal policy:

> Plainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration. . .
>
> Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation. . .

Southland, 465 U.S. at 7.

Here we are presented with parallel circumstances. Failure to grant immediate review would leave in effect a decision of the Washington State Supreme Court that passage of the Scienter Amendment nullifies an obligation of a Washington State issuer to be bound by a strict liability cause of action enacted to avoid prolonged litigation by victimized investors. Similar to the case in *Southland*, the important federal policy embodied in the Contracts Clause prohibiting state legislation that retroactively impairs contracts would be seriously undermined if immediate review is not granted.

III. Whether Enactment of the Scienter Amendment Violates the Contracts Clause Raises a Substantial Federal Question

The Ellenburg appellees contend that the Contracts Clause challenge to the retroactive application of the Scienter Amendment does not present a substantial constitutional question because plaintiffs seek to enforce a contractual right to a statutory cause of action. Ellenburg Br. at 16-20. But the Washington State Supreme Court had no difficulty recognizing the merits of this constitutional claim. The court below initially acknowledged the rule that "[i]n situations where statutes govern the interpretation and enforcement of private agreements, such statutes may create contractual rights . . ." *Haberman*, 749 P.2d at 1059. *See* Plaintiffs' Jurisdictional Statement at 11-12, 15-16.

Plaintiffs' appeal, however, does not rely solely on generally accepted rules of contract intepretation. It is firmly grounded on explicit language of a contract binding on sellers of WPPSS 4/5 bonds, specifically Section 14.1 of WPPSS Resolution 890. Prefaced with the caption, "Resolution and Laws a Contract with Bondholders," Section 14.1 declares: "*In consideration of the purchase* and acceptance *of the Bonds by those who shall hold the same from time to time*, the provisions of [Resolution 890 and the laws of the State of Washington] shall constitute a contract with the holder or holders of each Bond. . . and the obligations of the [Supply] System and the [WPPSS] Board under said laws and under the Resolution shall be enforceable by any court of competent jurisdiction." (Emphasis added.) Plaintiffs' Appendix at 129.

It has long been held that the laws of a state which subsist at the time a contract is made enter into and become part of the contract. *Von Hoffman v. Quincy*, 4 Wall 535, 550 (1867). *Accord, Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 429-430 (1934). By expressly incorporating this principle of law in Section 14.1, WPPSS promised that the laws of the State of Washington existing at the time investors purchased WPPSS 4/5 bonds were deemed part of the remedies available to enforce rights arising out

of the securities transaction. There can be no other fair construction of language stating that the laws of the State of Washington "shall constitute a contract" in consideration of the purchase of WPPSS 4/5 bonds "by those who shall hold the same from time to time." This construction is not only consistent with precedent, it fully comports with the language of RCW 21.20.430(1). This statute declares an investor complaining of prospectus fraud "may sue either at law or in equity to recover the *consideration* paid for the security." (Emphasis added.)

Implicitly acknowledging the validity of plaintiffs' impairment of contracts argument, appellees alternatively resort to a most curious, strained interpretation of Section 14.1. They ask this Court to read that provision of the bond indenture as an agreement by WPPSS 4/5 bond purchasers that the laws of the State of Washington could be amended and supplemented willy-nilly to eliminate property rights to statutory causes of action for prospectus fraud.

The Ellenburg appellees state their remarkable case as follows: "[T]he fact of the matter is that the Bond Resolution envisions and adopts state law 'as amended and supplemented.' In short, the Bond Resolution contemplates amendments to state law. . ." Ellenburg Br. at 18. This argument distorts the ordinary manner of contract draftsmen. What Section 14.1 does say is that the bond indenture is adopted "under the authority of and in full compliance with the Constitution and the laws of the State of Washington, including Titles 43 and 54 of the Revised Code of Washington, as amended and supplemented." Plaintiffs' Appendix at 129. There is no other accepted way of identifying the laws that have been amended at the time a contract is formed. Appellees construction of Section 14.1 turns an obligation into a nulllity.

If there is an ambiguity in Section 14.1 — and plaintiffs cannot find any — that provision should be construed against WPPSS because the "State's self-interest is at stake." *United States Trust Co. v New Jersey*, 431 U.S. 1, 26 (1977). In rejecting an earlier attempt of Washington State to impair WPPSS bond contracts, the court in *Continental Illinois National Bank and Trust Co. v. State*

of Washington, 696 F.2d 692, 701 (9th Cir. 1983), *appeal denied for want of standing*, 460 U.S. 1077 (1983), held: "WPPSS is itself a political subdivision of the State [of Washington], made up of other political subdivisions. . . Because the State is a contracting party, we give less deference to its claims of justification for impairment." *See also Hoffer v. State of Washington*, 110 Wash.2d 415, 755 P.2d 781,786 (1988) (holding that the involvement of the Washington State Auditor in the offer and sale of WPPSS 4/5 bonds was the equivalent of the State itself engaging "in proprietary acts" making it subject to the Washington Blue Sky Laws).

The Ellenburg appellees also contend that passage of the Scienter Amendment was a legitimate exercise of Washington State authority under the police power doctrine. Ellenburg Br. at 20-22. Because plaintiffs have already thoroughly addressed this argument, Plaintiffs' Jurisdictional Statement at 17-18, we need not repeat it at length here. The fact remains appellees simply cannot demonstrate passage of the Scienter Amendment was made necessary by an important general social problem. And they made no attempt to do so in their briefs. Indeed, the circumstances of this case illustrate the prescient concern of the Framers that state legislators would be exposed to "sudden and strong passions," *Fletcher v. Peck*, 6 Cranch 87, 138 (1809), the very reason for including the Contracts Clause in the Constitution. *See* Plaintiffs' Jurisdictional Statement at 12, n. 7.

The primary case cited by the Ellenburg appellees to support their contention that the constitutional issues raised by this appeal are not substantial supports plaintiffs' position when closely examined. The appellant in *Waggoner v. Flack*, 188 U.S. 595 (1903), had violated his contract with the State of Texas to purchase land. The purchase had been made pursuant to a statute which was subsequently amended to allow for the remedy of forfeiture. Far from the interpretation given it by the appellees through the use of an out-of-context quote, the holding in that case was actually as follows: "[T]here was no promise or contract expressed in the statute that the State could not enlarge the remedy or grant another *on account of the purchaser's violation of his contract*. . ." 188 U.S. at 603. (emphasis added.) *Waggoner* thus stands for the proposition that

the Contracts Clause cannot be manipulated to shield from liability those who breach their contractual obligations. Plaintiffs seek nothing more than the same sound result on this appeal.

CONCLUSION

For the reasons above stated, this Court should deny appellees' motions and award the relief requested at the conclusion of plaintiffs' jurisdictional statement or, pursuant to Rule 16.7, such other and further relief as would be appropriate.

Respectfully submitted,

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